Supreme Court, U.S.
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No. 99-880

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, et al.,

Petitioners,

v.

HERBERT MARTELL COLLINS AND
UWANDOLYN BLACKWELL COLLINS,

Respondents.

**On Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower court's opinion – allowing a bankruptcy debtor to avoid the Eleventh Amendment's bar to the filing of a suit against a State by initiating a discharge proceeding through a motion rather than an adversary proceeding – conflicts with the Eleventh Amendment and decisions of this Court.

2. Whether a court may grant an individual debtor a discharge from a debt owed to a State for a bail bond forfeiture, despite the words of 11 U.S.C. § 523(a)(7), which excepts from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to or for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

PARTIES TO THE PROCEEDING

1. THE COMMONWEALTH OF VIRGINIA, COMMONWEALTH OF VIRGINIA ex rel. CITY OF NORFOLK, AND THE COMMONWEALTH OF VIRGINIA, ex rel. NORFOLK GENERAL DISTRICT COURT are the Petitioners.

2. HERBERT MARTELL COLLINS and UWANDOLYN BLACKWELL COLLINS are the Respondents.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 173 F.3d 924 and is reproduced in the Appendix at 1. The opinion of the District Court is unreported and is reproduced in the Appendix at 22. The opinion of the Bankruptcy Court is unreported and is reproduced in the Appendix at 35.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1999. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on June 2, 1999. App. at 48-49. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Bankruptcy Code, 11 U.S.C. § 106, provides that:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections . . . 523 . . . of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> * * *
>
> (b) A governmental unit that has filed a proof of claim in the case is deemed to have

> waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose. . . .

The Bankruptcy Code, 11 U.S.C. § 523(a)(7), provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt. . . .
>
> (7) to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit and is not compensation for actual pecuniary loss, other than a tax penalty. . . .

Federal Rule of Bankruptcy Procedure 7001 provides:

> An adversary proceeding is governed by the rules of this Part VII. It is a proceeding . . . (6) to determine the dischargeability of a debt. . . .

Federal Rule of Bankruptcy Procedure Rule 7003 provides:

> Rule 3 F.R.Civ.P. applies in adversary proceedings.

Federal Rule of Civil Procedure Rule 3 provides:

> A civil action is commenced by filing a complaint with the court.

Federal Rule of Bankruptcy Procedure Rule 7004(a) provides:

> Rule 4(a), (b), (c)(1), (d)(1), (e) – (j), (l), (m) F.R.Civ.P. applies in adversary proceedings.

Federal Rule of Civil Procedure Rule 4(a) provides:

> The summons shall be . . . directed to the defendant. . . . It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint.

STATEMENT OF THE CASE

A. Statement of Facts

The Respondent, Herbert Collins, was a licensed professional bail bondsman under the terms and provisions of § 19.2-152.1 of the Code of Virginia, and pursuant to the Rules and Regulations of the Norfolk Circuit Court and Norfolk General District Court. As such, Mr. Collins signed as surety on numerous criminal appearance bonds in the City of Norfolk, Virginia, and collected a percentage of the face amount of such bonds as premiums from criminal defendants. Pursuant to the provisions of §§ 19.2-143 through 19.2-150 of the Code of Virginia, Mr. Collins became personally liable to the Commonwealth as surety on forfeited bail bonds for criminal defendants who failed to appear at criminal proceedings initiated against them.

The Respondents, Mr. and Mrs. Collins (hereinafter "the Collins" or "Debtors") filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Virginia, Norfolk Division, in June 1990. At that time, Mr. Collins owed the Commonwealth in excess of $37,100 on such forfeited bail bonds. The bankruptcy case was a "no asset" case, which is one in which there are no non-exempt assets available for distribution to creditors. (The vast majority of individual Chapter 7 bankruptcy cases fall in that category). In accordance with bankruptcy court procedures in such cases, all creditors were directed not to file a proof of claim, and the Commonwealth did not do so. On October 11, 1990, approximately four months after the filing of the bankruptcy petition, the court granted the Debtors a general discharge in bankruptcy. App. at 64. The Debtors made no effort during the time their case was open to obtain a determination of the dischargeability of any specific debt, including the bail bond forfeitures that Mr. Collins owed to the Commonwealth. App. at 62, ¶ 9.

Inasmuch as the Commonwealth believed that the bail bond debts were excepted from discharge pursuant to 11 U.S.C. § 523(a)(7), it subsequently garnished Mr. Collins' wages in an effort to collect the amount owing from those forfeitures. The first garnishment was filed by the Commonwealth in state court in April 1995 and netted $586.00; the second garnishment in October 1995, netted $939.00; a third garnishment filed in February 1996 was unsuccessful in recovering any funds.

B. The Proceedings Below

On or about July 30, 1996, the Collins filed a Motion to Reopen their Chapter 7 case, asserting as the basis therefor that the Commonwealth's judgments for the forfeited bail bonds were discharged in the 1990 bankruptcy case and that the subsequent attempts to collect them violated 11 U.S.C. § 524(a) of the Bankruptcy Code.[1] The Commonwealth responded by making a special appearance for the limited purpose of objecting to the Debtors' Motion to Reopen, asserting that the debt was non-dischargeable under Section 523(a)(7), and hence there was no need to reopen. App. at 56. On September 17, 1996, the Bankruptcy Court held a hearing on the Collins' Motion to Reopen during which there was, in accordance with the bankruptcy court's practice, some preliminary discussion of the merits of the discharge action.[2]

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[1] An amended motion, that did not differ in substance from the original motion, was filed on August 7, 1996. App. at 60. These motions were served on Michael Glasser, an attorney with the law firm representing the Commonwealth in the state court collection matters against Mr. Collins.

[2] The Fourth Circuit held that upon a motion to reopen to determine dischargeability, the bankruptcy court should only reopen the case if it determines that the debt may, in fact, be dischargeable. *Hawkins v. Landmark Finance Co.*, 727 F.2d 324, 326-327 (4th Cir. 1984). Accordingly, the bankruptcy court was

However, at the end the hearing, counsel for the Commonwealth, Melvin Zimm, reminded the court that "the procedural posture would be such that if the motion to reopen would be granted, an adversary proceeding would have to be filed." App. at 54. He also reminded the bankruptcy court that he " . . . made a special appearance on behalf of the Commonwealth . . . " and that if an adversary proceeding were filed "[t]he Complaint would have to be served in accordance with the bankruptcy rules." *Id.* Thus, regardless of the scope of the discussions at the hearing, the State made clear that it continued to insist on being accorded all the due process required under the Bankruptcy Rules, including, specifically, the requirement that the dischargeability of a specific debt be resolved in a formal adversary proceeding, pursuant to Rule 7001(6).

On November 8, 1996, the Bankruptcy Court entered an order concluding that the Commonwealth's judgment in the amount of $37,130 against Mr. Collins for the forfeited bail bonds was dischargeable. App. at 35. The Bankruptcy Court, therefore, granted the Debtors' Motion to Reopen. The court's ruling determined not only the limited issue of whether the case should be reopened, but also the substantive issue of the dischargeability of the debt owed to the Commonwealth. At no time was the debtor required to initiate an adversary proceeding or to serve a complaint upon the Commonwealth, as required by Bankruptcy Rules 7001, 7003, and 7004, and as demanded by the Commonwealth, in order to obtain a determination of the merits of the issues regarding the dischargeability of the debt. The United States District Court for the Eastern District of Virginia upheld the Bankruptcy Court's ruling in an opinion and order entered April 2, 1997. App. at 22.

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obligated to make a preliminary assessment of the merits of the underlying substantive argument.

The Commonwealth filed a Notice of Appeal on April 30, 1997, with the district court to perfect the appeal to the Fourth Circuit. After the district court issued its opinion, the Fourth Circuit issued its opinion in *Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths)*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998), which discussed the impact on bankruptcy cases of this Court's holding in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and held that a State would not be forced to defend an adversary action brought by a debtor to recover an allegedly preferential transfer. The Commonwealth then filed a Motion to Dismiss for Lack of Jurisdiction with the Fourth Circuit on September 3, 1997, which the Debtors opposed. The Fourth Circuit, however, denied the Motion without prejudice by order dated January 8, 1998. App. at 50-51.

In ruling on the appeal, however, the Fourth Circuit did not base its decision on *Schlossberg*. Instead, it relied on its analysis in a later decision, *Maryland v. Antonelli Creditors Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997), to find that the discharge issue could be determined in the context of a motion to reopen the case. In this case, as in *Antonelli*, it based its decision on several assertions. First, it stated that the motion to reopen was not a suit "against" the State, because it was based on the court's jurisdiction over the debtors and their estate, not on jurisdiction over the creditors. Second, it pointed to the fact that the Commonwealth was not named as a defendant or served with process as proof that the State was not, therefore, "compelled" to appear in federal court. The court further held that the discharge issue could be determined as part of the motion to reopen because the court's jurisdiction over that issue also arose from its control over the debtor and its estate, and it could discharge a debtor, "regardless of whether a state is a creditor." App. at 12. Finally, the Fourth Circuit held that the bankruptcy court's authority to enter a general order of

discharge also allowed it to determine the specific applicability of the statutory discharge to the Commonwealth's debt, even though the debtor had not followed the requirements of the Bankruptcy Code, which *require* that discharge complaints be filed as adversary proceedings, with service of a complaint and summons upon the Commonwealth.

On the merits the court held that the debts owed for bail bond forfeitures were not "fines, penalties or forfeitures" within the meaning of 11 U.S.C. § 523(a)(7), because they were not "penal in nature" in that they were not imposed due to any wrongdoing by the debtor, and were, therefore, dischargeable.

REASONS FOR GRANTING THE PETITION

A writ of certiorari should be issued to review the Fourth Circuit's opinion because the opinion misconstrues the nature of what constitutes a "suit against" a State and makes the State's Eleventh Amendment rights turn on the superficial mechanics of the way in which the action is pled, rather than on the real interests of the State in the proceeding. More fundamentally, the decision is flawed because it fails to recognize the extent to which the Eleventh Amendment limits the ability of a bankruptcy court to grant relief to a debtor that impinges on the interests of the States. As such, and particularly based on the erroneous reasoning used by the Fourth Circuit, the decision threatens to create an exception that will swallow up the rule of Eleventh Amendment immunity not only in bankruptcy cases, but in any proceeding where the federal court can assert that it is basing its jurisdiction on its control of a particular asset, or where the proceeding is initiated by a motion or other process in lieu of a traditional complaint or adversary action. Finally, should this Court reach the merits of the case, it should reverse the Fourth Circuit's construction of the discharge exception contained in Section 523(a)(7), because the court has chosen to engraft a limitation on

that exception that does not appear anywhere in the Code itself. By doing so, the lower court arrogates to itself a policy choice that is reserved to Congress, and violates the plain meaning rule of statutory construction. *See United States v. Noland*, 517 U.S. 535, 542 (1996), *Toibb v. Radloff*, 501 U.S. 157, 162 (1991).

I. THE CIRCUIT COURT'S DECISION ON THE SCOPE OF THE ELEVENTH AMENDMENT CONFLICTS WITH THIS COURT'S RULINGS AND THE ELEVENTH AMENDMENT

A. Bankruptcy Cases Are Fully Subject To The Eleventh Amendment.

Three years ago, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) this Court held, in the most unequivocal terms, that the Eleventh Amendment precludes Congress from using any of its Article I powers to abrogate a State's sovereign immunity in federal court. As this Court explained there, 517 U.S. at 72.

> [T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts the judicial power under Article III and Article I cannot be used to circumvent the Constitutional limitations placed upon federal jurisdiction.

The Court specifically noted the possible application of its holding to the bankruptcy (and antitrust and copyright) laws and rejected the argument that this should militate against the breadth of its holding, noting that

"This Court never has awarded relief against a State under any of those statutory schemes. . . . " Id. at 73, n. 16. The Court strongly underscored its commitment to *Seminole* and its underlying principle of retained state sovereign immunity, in its recent federalism trilogy of *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199, 1999 WL 412723 (1999); *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 119 S. Ct. 2219, 1999 WL 412639 (1999); and *Alden v. Maine*, 119 S. Ct. 2240, 1999 WL 412617 (1999). In light of the Court's words, and the explicit language in Article I providing Congress with the power to establish a bankruptcy system, the Fourth Circuit and every other circuit that has considered the issue have had little difficulty in concluding that bankruptcy is, in general, subject to the requirements of the Eleventh Amendment.[3]

B. The Fourth Circuit's Conclusion That Proceedings To Litigate Discharge Exceptions Are Not "Suits" Conflicts With This Court's Holdings And Misconstrues The Nature Of Bankruptcy Cases.

While the Fourth Circuit concedes that the Eleventh Amendment is applicable in bankruptcy, it validates what occurred here based on its conclusion that proceedings to determine whether the Commonwealth's debt was discharged do not constitute a "suit" within the meaning of the Eleventh Amendment's prohibitions. Although this Court's recent Eleventh Amendment decisions have explored the scope of the States' immunity, the Court has

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[3] *See Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths)*, 119 F.3d 1140, 1146 (4th Cir. 1997); *Sacred Heart Hospital v. Pennsylvania (In re: Sacred Heart Hospital)*, 133 F.3d 237 (3rd Cir. 1998); *Fernandez v. PNL Asset Management Co. (In re: Fernandez)*, 123 F.3d 241, *as amended by*, 130 F.3d 1138 (5th Cir. 1997).

had but scant occasion in the 200 years since passage of the Amendment to determine the meaning of the word "suit" as contained in that Amendment. This case presents just that issue for resolution.

In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court was required to discuss that term in order to determine whether appellate review of a federal question presented in a State court action commenced *by* a State would be barred by the Amendment's bar on "suits" commenced *against* a State. In holding that the review was not barred, the Court broadly described a "suit" as "the prosecution or pursuit of some claim, demand or request. In law language, it is the prosecution of some demand in a court of justice." 19 U.S. at 407. However, in concluding that the purely appellate review of a federal issue in a suit filed *by* a State was not a "suit," the court noted that the normal method of commencing a case *against* a party was by the filing of process against that party.

In this case, and in its prior decision in *Antonelli*, the Fourth Circuit seized on that reference to the use of "process" as a reason for narrowly defining the notion of a "suit" so as to make large portions of the bankruptcy process not subject to the Eleventh Amendment. Indeed, the analysis used by the circuit court, and its acquiescence in the debtor's sidestepping of the procedural requirements of the Bankruptcy Rules, would allow the exception to swallow the whole and would largely remove bankruptcy from the strictures this Court has enunciated in its recent Eleventh Amendment cases. Moreover, the same method of analysis could quickly spread to other federal laws that deal with issues involving property. As such, it is imperative that this Court reverse the Fourth Circuit's holding and clarify that the fundamental importance of the States' retained sovereign immunity requires that it not be sacrificed to "elementary mechanics of captions and pleading." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1977).

The Fourth Circuit's opinion is based on its perceived need to ensure that "bankruptcy courts retain the power to discharge debts, including debts owed to States, consistent with established federal supremacy with respect to bankruptcy." App. at 14 (citations omitted). The difficulty with the court's approach, though, is that it confuses the authority of Congress under the Supremacy Clause to provide relief to debtors, with the question of whether a federal court has the power to interpret and apply that law to States and the debts owed to them. Its fundamental confusion is further reflected in the factors it cites to prove that the litigation of discharge exceptions does not constitute a "suit" against the State – all of which either conflict with holdings of this Court, are irrelevant, or are non sequiturs. As a result, the court's opinion rewards "gamesmanship" by debtors in pleading their case, while denying States the procedural rights to which they are statutorily and constitutionally entitled.

1. Application Of The Eleventh Amendment Does Not Depend Upon Procedural Niceties Or Mechanics Of Pleading.

By holding that the extent of the States' rights turn on the precise technical way in which these proceedings are brought, the court makes the application of the Eleventh Amendment dependent on exactly those "elementary mechanics of captions and pleading" that this Court denounced in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. at 270. Actions in bankruptcy cases that affect creditors generally are usually commenced by the filing and service of motions, rather than by adversary proceedings, which require the service of a complaint and summons.[4]

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[4] *See* Bankruptcy Rule 7001 for the limited number of actions, most of which are only applicable to individual creditors, that must be brought by way of adversary

The Fourth Circuit's opinion places a great premium on those distinctions in arguing that States are not "compelled to appear" in response to a motion, unlike the situation where they are served with "compulsory process" in an adversary proceeding. App. at 11, 14. The difference in the method of proceeding, though, has no practical effect. The only consequence of a failure to appear in regard to the compulsory process of a summons, as set forth in Fed.R.Civ.P. 4, is that a default judgment will be entered against the defendant. This is exactly the same fate that the Fourth Circuit threatens will await a State that does not participate in a case in response to a motion being filed. App. at 14. Since the net result of a failure to appear in either action is precisely the same, this can hardly be a distinguishing feature of whether or not a case is a "suit" for Eleventh Amendment purposes.

As this Court held in *Cohens*, a "suit" is a "prosecution or pursuit of some claim, demand or request . . . in a court of justice." 19 U.S. at 407. In this case, the debtor requested in his Motion that the bankruptcy court reopen his case so that he could be provided with an adjudication of his rights *vis-à-vis* the Commonwealth and be granted injunctive relief to preclude the Commonwealth from undertaking further collection actions. When the federal bankruptcy court issued its order it granted Mr. Collins exactly the relief that he sought. What more is necessary to constitute a "suit"?

While the Motion was not served by the use of process, this is hardly dispositive. This Court has not, in its few prior decisions involving such an issue, applied a "narrow" formalistic view of the term "suit" as the basis for denying parties access to review and protection under the Constitution. *See, e.g., Weston v. City Council of Charleston*, 27 U.S. (2 Peters) 448 (1829), where the Court was

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proceedings. Other matters are normally instituted through the motions process.

called on to decide whether a writ of prohibition constituted a "suit," and Justice Marshall wrote that "the term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him." And, again, in *Ex parte Milligan*, 71 U.S. 2, 112 (1866), this Court was urged to construe the term "cause" narrowly so as to find that Milligan could not appeal the lower court's refusal to issue a writ of habeas corpus. The Court brushed aside that legalistic argument, noting that:

> In any legal sense, action, suit, and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more . . . When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. . . .

71 U.S. at 112.

The Fourth Circuit relies on form over substance, rather than engaging in a meaningful analysis of what relief is actually being sought in a particular motion. Some motions, like a motion to reopen, may indeed be non-adversarial. But, if so, it is because the relief granted does not, standing alone, affect the rights of any party. *See In re Plumlee*, 1999 WL 557164, ___ B.R. ___ (Bankr. E.D. Va. 1999) (order reopening a debtor's case is not a final determination adverse to any party and may not even be an appealable final order). But here, the Fourth Circuit swept aside those considerations and allowed the debtors to obtain, in the context of a motion to reopen the case, an order specifically adjudicating whether the general discharge in their 1990 bankruptcy case applied to

the Commonwealth's debt and enjoining the Commonwealth from any further action to collect that debt – all without regard to the Eleventh Amendment. All of this, it held, could happen merely because the debtors incorporated their request for relief into a motion and because the bankruptcy court decided to rule on the merits of that requested relief without obligating the debtor to comply with the requirement for filing an adversary proceeding.

2. An Action Initiated By A Debtor To Determine Dischargeability Of A Particular Debt Is A Suit Subject To The Eleventh Amendment.

To the extent that the lower court suggests here, and in *Antonelli,* that a bankruptcy case is not a suit "against" anyone, including the States, it ignores the requirement that all federal judicial actions *must* involve a "case or controversy." If the procedure initiated by the Collins to determine the dischargeability of debts owed to the Commonwealth is not a "suit" then, at best, the lower court has simply issued an advisory opinion – a power that federal courts do not possess. *See Hewitt v. Helms,* 482 U.S. 755, 761 (1987); *Taylor v. Voss,* 271 U.S. 176, 180 (1926). Bankruptcy cases, like any other federal court case, *must* involve adverse parties and surely cannot escape being a "suit" on that ground alone.[5] The court cannot avoid the application of the Eleventh Amendment merely by ignoring the most fundamental limitation on federal power in Article III.

The Fourth Circuit's opinion ignores the fundamental aspects of federal jurisprudence by making the form of a

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[5] And, while, to be sure, the Bankruptcy Code eliminates most bases on which a creditor may challenge the debtor's right to obtain a discharge, it surely ignores reality to conclude that a judicial proceeding that results in barring creditors from trying to collect the legitimate debts that they are owed is not "adversarial," from the debtors' or the creditors' perspective.

pleading all important, instead of facing the unmistakable fact that the debtor was seeking a declaratory and injunctive judgment from a federal court on the specific issues regarding the Commonwealth's debt.[6] Discharge exceptions, by definition, are only relevant *after* the debtor's estate has been distributed and he has received his general discharge. It is only then that there may be a dispute as to how that general discharge will be applied to a particular case, and, quite clearly, that dispute only has relevance between the debtor and the individual creditor. The resolution of such a dispute between two opposing parties is clearly a "suit," regardless of the mechanism by which the court's jurisdiction is invoked and relief is provided to the debtor.

The Fourth Circuit erred further, even assuming, that the form of the pleading *is* relevant to the determination of whether the debtor has filed a "suit" against the State. For the fact is that the Bankruptcy Rules *require* that discharge exceptions be filed as adversary proceedings – which do entail all of the procedural niceties that the court insists are the hallmark of a "suit." Yet, despite that unequivocal requirement, and the Commonwealth's insistence in the bankruptcy court that it was entitled to that procedural due process, the Fourth Circuit upheld the bankruptcy court's decision to ignore the Rules and determine the discharge issue as part of the resolution of an essentially ministerial motion to reopen the case. Thus, under the holding of this case, States will not enjoy Eleventh Amendment immunity when an action can be

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[6] This Court has repeatedly held that the fact a suit seeks injunctive or declaratory relief does not overcome a State's Eleventh Amendment immunity. *Green v. Mansour*, 474 U.S. 64, 72-73 (1985) (declaratory judgment claim against State barred); *Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) (same); *Cory v. White*, 457 U.S. 85 (1982) (interpleader action barred).

brought by "motion" – but they will also lose if the action is to be brought by adversary proceeding, so long as the debtor finds a way to sidestep that requirement. Allowing the Rules to be circumvented in this fashion, despite the jurisdictional nature of the requirement of an adversary proceeding,[7] permits debtors to manipulate the system at will in order to deny the States their Eleventh Amendment rights. If the Eleventh Amendment loses its force any time a private party ignores the procedural requirements that would trigger its application, it will be an ephemeral protection indeed.[8]

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[7] In *Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995), the court held that Rule 7001's requirement that an adversary action be instituted to avoid a lien trumped the debtor's efforts to avoid the lien through the provisions of its Chapter 13 plan, even if the creditor did not object to the plan – because the requirement of Rule 7001 is jurisdictional. *See also, In re: Galey*, 230 B.R. 898 (S.D. Ga. 1999).

[8] The absurdity that results from this mechanistic approach to the Eleventh Amendment is reflected in the decision of one lower court which conscientiously attempted to follow the Fourth Circuit's decisions. In *A.H. Robins Co. v. Dieleuterio, Treasurer of the State of New Jersey, et al. (In re A.H. Robins Company, Inc.)*, 235 B.R. 406 (Bankr. E.D. Va. 1999), the Debtor filed an adversary proceeding seeking a declaratory judgment that its plan controlled the treatment of certain tax issues. The bankruptcy court concluded that the Debtor's action was barred by the Eleventh Amendment *because* it had been filed as an adversary action, but added that if the Debtor simply refiled its action as a *motion*, the court *would* then be able to consider the issues. 235 B.R. at 413 & n. 3. The Amendment will surely provide little real protection for the States if it loses all force whenever the title of the pleading is changed from "Complaint" to "Motion."

3. Even Pure *In Rem* Cases Are Not Excepted From The Eleventh Amendment.

Perhaps most significantly, the Fourth Circuit repeatedly asserts that a bankruptcy case is an *in rem* proceeding and that its power stems from jurisdiction over the debtor and its assets, not the creditors. The assertion is inaccurate because a bankruptcy case is, quite clearly, not a purely *in rem* action. Bankruptcy courts not only decide the disposition of a debtor's existing assets, they also impose injunctions that bar creditors from making further efforts to seek payments from the debtor. A bankruptcy court provides a debtor a discharge of his personal liability to all creditors. In doing so, a bankruptcy court plainly provides a remedy that is not available to a party in an *in rem* action, where the allocation of a particular asset does not bar plaintiffs from pursuing other means of collecting from a defendant. *Cf. In re Newport Offshore*, 219 B.R. 341 (D.R.I. 1998) (the right to impose a discharge is the single defining difference between a valid state receivership program and an invalid attempt to enact a bankruptcy law).

The assertion is also a non sequitur in that this Court has frequently and forcefully stated that the Eleventh Amendment has equal applicability to *in rem* actions, so that bankruptcy would not be exempt from the Eleventh Amendment even if it were solely an *in rem* action. *See Missouri v. Fiske*, 290 U.S. 18, 21 (1933), *United States v. Nordic Village*, 503 U.S. 30, 38 (1992) (quoting *United States v. Shaw*, 309 U.S. 495, 502-503 (1940)), *see also Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997) (in which *all* members of this Court agreed that the Eleventh Amendment applied in an *in rem* action to quiet title vis-a-vis the State).

Moreover, while the Code – whatever the jurisdictional basis therefor – does grant a bankruptcy court the right to enter a general order of discharge, it neither guarantees nor assumes that the bankruptcy court will be called on to adjudicate the dispute between a debtor and

a specific creditor as to whether a particular debt is excepted from discharge.[9] The Code leaves resolution of such issues to the concurrent jurisdiction of the federal and state court. In this case, for example, following entry of the Collins' general discharge, Virginia sued Mr. Collins in state court to collect on the bond forfeiture debts. The dischargeability of those debts could have been raised by the debtor as a defense, in state court, which would have had complete authority to review the issue and resolve it by the application of the Code's discharge provisions in a suit brought *by* the State. Instead, the debtor ultimately chose to initiate a proceeding in the bankruptcy court, but then failed to follow the applicable rules.

C. The Fourth Circuit's Opinion Seriously Erodes States' Eleventh Amendment Immunity And Usurps Congress' Power To Determine The Applicable Substantive Law.

By asserting that courts in bankruptcy cases derive their jurisdiction solely from their control over the debtor's estate and its assets, and by confusing and conflating the determination that the debtor is entitled to the benefit of the general bankruptcy discharge, with the litigation of the application of particular discharge provisions to the specific facts of the Commonwealth's debt, the court not only errs in this instance, but promulgates an overly broad exception to the Eleventh Amendment. Application of the Fourth Circuit's analysis will have a

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[9] There are only 4 (of 18) discharge exceptions that must be brought in bankruptcy court. All others may either be heard in the bankruptcy court or be raised as a defense in a State court collection action. This is distinct from the determination as to whether the debtor has satisfied the criteria necessary to allow the court to certify that he is entitled to the general statutory discharge provided under Chapter 7 of Title 11.

wide-ranging affect not only on bankruptcy law, but on other federal laws and disputes relating to property.

For instance, the series of shaky rationalizations cited in this opinion are also relied on by the Fourth Circuit to authorize the federal courts not only to decide discharge complaints, but, as in *Antonelli*, to virtually rule out application of the Eleventh Amendment to the plan confirmation process. According to the Fourth Circuit, the injunction contained in the federal court's order confirming the plan does not implicate the Eleventh Amendment because the confirmation of a plan is not a "suit," since the individual creditors are not named in a complaint or served with process. This conclusion emboldens debtors to write provisions into their plan that go far beyond what the Bankruptcy Code entitles them to, and encourages them to then argue that the State is faced with a Hobson's choice if it wishes to object to their overreaching. The State may voluntarily appear and object to the plan, but doing so, the Fourth Circuit holds, gives the court jurisdiction over the State and binds it to the plan. Alternatively, the State may decline to appear, but in that case, the circuit court says, the State will be bound by the plan's terms by *res judicata*, whether or not the terms are consistent with the Code. Thus, if the State wishes to preserve its right not to be haled into federal court, it will be debtors and the federal judiciary, not Congress, who determine the scope of obligations imposed on the State by the Bankruptcy Code. But the Eleventh Amendment bars States from being placed in that position – indeed, that is precisely the difference between the effect of the Eleventh Amendment and the Supremacy Clause. Congress may impose a substantive requirement that will be binding upon the States by virtue of the Supremacy Clause, but the Eleventh Amendment bars the federal judiciary from extending those requirements at the behest of a private individual. And, by the same token, States cannot be forced to allow the federal courts to adjudicate

disputes over the application of that law to the facts of their cases.

By asserting that it does possess those powers, because it is acting pursuant to its *"in rem"* jurisdiction over the debtor's assets, the Fourth Circuit has devised an approach that can readily be applied to weaken or eliminate the application of the Eleventh Amendment in similar situations where the federal court case involves multi-party disputes over a particular piece of property or other asset. In Superfund actions, for instance, the case could be recast as one where the federal court is deciding all parties' rights and obligations with respect to the *res* of the toxic waste site. If so, private parties could resurrect *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and resume filing suits against the States, with perhaps the only requirement being that they use the legal fig leaf of filing their actions in the form of a "motion." Similarly, the impact of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), could be eliminated simply by characterizing patent infringement suits against States as being based on a federal court's *in rem* jurisdiction over the intangible assets created by the federal government's grant of patent rights, and by allowing the patent holder to file a motion asking for a declaration of his rights against the world at large (including, of course, the States). Such easy subterfuges are plainly inconsistent with the constitutional significance of State sovereign immunity in federal courts.

The negative impact of the Fourth Circuit's analysis is further shown by the confusion that it has caused in other circuits and, indeed, even within the Fourth Circuit itself. In a number of cases, other courts have refused to allow the type of proceeding that took place in this case. In *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999), for instance, the court allowed a debtor to assert its bankruptcy discharge as a *defense* to a state court action that the State had subsequently

removed to the federal court, but held that, if the debtor had *affirmatively* sought a determination of the dischargeability of the debt, this would have required an adversary proceeding to which the Eleventh Amendment would have applied. 142 F.2d at 820. *See also, Mitchell v. California Franchise Board (In re Mitchell)*, 222 B.R. 877 (9th Cir. BAP 1998) (determination of dischargeability of a single debt is distinguishable from the issue of whether a general discharge has entered, and *must* be heard by adversary proceeding; Eleventh Amendment bars action from being initiated in federal court by private party). Yet, while those courts held that the Eleventh Amendment would bar the bankruptcy court from hearing the discharge action, they nevertheless cited *Antonelli*, whose rationale is the basis for *this* decision, without apparent disagreement. Thus, they come to precisely the opposite conclusion as to how the Fourth Circuit's "bankruptcy is not a suit" analysis should apply in the discharge context.

Similarly, in *DeKalb County Division of Family And Children Services v. Platter (In re Platter)*, 140 F.3d 676 (7th Cir. 1998), the court held that the Eleventh Amendment did not apply to an adversary proceeding that the *State* had initiated in bankruptcy court to determine the dischargeability of a debt,[10] and cited *Antonelli* in support of that proposition. While the court was, perhaps, correct that the Eleventh Amendment does not apply to a discharge complaint filed *by* the State,[11] its reliance on *Antonelli* to reach its conclusion muddies the waters and

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[10] The State had brought the discharge action because certain exceptions, under the Code, may *only* be brought in the bankruptcy court; if the creditor does not affirmatively file a timely action in the bankruptcy court, the debt is discharged as a matter of law as part of the general discharge.

[11] *Cf. Gardner v. New Jersey*, 329 U.S. 565, 572 (1947), where this Court held that the debtor could object to a claim that was voluntarily filed by the State without implicating the Eleventh Amendment.

encourages the result that occurred here, namely allowing a debtor to *affirmatively* seek a discharge determination against an unconsenting State. Thus, absent clarification by this Court, the Fourth Circuit's analysis is likely to continue to lead other courts astray.[12]

Indeed, the difficulties caused by the mechanistic approach adopted by *Antonelli* and this case, can be clearly seen in the Fourth Circuit's own subsequent holding in *NVR Homes, Inc. v. Maryland (In re NVR)*, ___ F.3d ___, 1999 U.S. App. LEXIS 15499 (4th Cir. July 12, 1999), in which the debtor sought to determine, by motion, whether its confirmed plan barred the collection of certain taxes and whether as a consequence, the debtor was entitled to a refund of those taxes. In *NVR*, even though the proceeding was brought by motion, the Fourth Circuit held that the fact that the suit would result in an order that could require the State to pay money out of its treasury, was sufficient to implicate the Eleventh Amendment. The circuit court distinguished *NVR* from *Antonelli* and aligned itself with *Schlossberg* on that basis. Taking the three cases together then it would appear form triumphs over substance, *unless* the State has already collected the money, in which case the Eleventh Amendment wins. Clearly, there is nothing in the words of the Amendment or this Court's case law that supports such a distinction in the bankruptcy arena between collecting and refunding State funds. Even more tellingly, the court in *NVR* did not even attempt to reconcile that decision with *this* case, even though the bankruptcy court's order

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[12] *See also, Rose v. U.S. Dept of Education (In re Rose)*, 1999 U.S. App. LEXIS 18481, n. 8, 1999 WL 592410, (8th Cir. 1999) (holding that the State waived its sovereign immunity from suit in a discharge action by filing a proof of claim and citing *Virginia v. Collins*, 173 F.3d 924 (4th Cir. 1999) with approval) (noting that, "this Court's June 1999 rulings on sovereign immunity have not resolved how far Congressional power extends in the bankruptcy context.").

could have required the State to refund the amounts it had already collected. In short, the *Antonelli/Collins* analysis is insupportable as a matter of law and logic, leads to wholly contradictory results based on "elementary mechanics of captions and pleading" and denies the States the immunity to which they are entitled, and cries out for reversal by this Court.

The Commonwealth submits that the importance of sovereign immunity to the States, and the need to clarify its applicability so that they are not forced to defend themselves in federal court unnecessarily, are matters of such great import that they should be dealt with now rather than waiting for further case development and confusion among the lower courts. In *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 145 (1993), this Court allowed an immediate appeal of a claim of Eleventh Amendment immunity under the "collateral order" doctrine, noting that the issue involves a "fundamental constitutional protection" and one where "the value to the States of their Eleventh Amendment immunity – like the benefit conferred by qualified immunity to individual officials – is for the most part lost as litigation proceeds. . . . " By the same token, continuing confusion over the scope of the application of the Eleventh Amendment to bankruptcy and other federal laws serves the interests of no one. In light of the *1.4 million* bankruptcy cases filed in the last year, virtually all by individuals who may have discharge issues to assert, it is not merely a possibility, but a certainty that States will continue to be improperly brought before the federal courts and forced to litigate these issues. As this Court stated in *Seminole*,

> the Eleventh Amendment does not exist solely in order to "prevent federal court judgments that must be paid out of a state's Treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 115 S. Ct. 394, 404, 130 L.Ed.2d 245 (1994); it also serves to avoid "the indignity of

> subjecting a state to the coercive process of judicial tribunals at the instance of private parties." [citations omitted]

517 U.S. at 58.

For these reasons, the Commonwealth respectfully urges that this case be taken and heard now, so that the States will not continue to "lose the benefit conferred" by their Eleventh Amendment immunity.

II. THIS PETITION SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF 11 U.S.C. § 523(a)(7) AND SERIOUSLY ERODES THE PROTECTION GIVEN STATES FOR FORFEITURES.

For the reasons set forth above, the Commonwealth believes that the federal courts have no authority to litigate the applicability of the discharge provisions of the Bankruptcy Code to debts owed to the Commonwealth and that the lower court's decision should be reversed and vacated in its entirety. Should the Court disagree on that issue, however, the Commonwealth also asserts that the Fourth Circuit's decision on the merits ignores the plain requirements of 11 U.S.C. § 523(a)(7), which excepts from discharge *any* debt for a fine, penalty or forfeiture which is "payable to, and for the benefit of a governmental unit and is not compensation for actual pecuniary loss. . . . " By adding a further requirement, not supported by the plain language of the Bankruptcy Code – that the fine, penalty or forfeiture be penal in nature – before the debt is excepted from discharge, the circuit court raises serious questions about the dischargeability of debts based on fines, penalties *or* forfeitures, that arise out of any civil obligation, even if those debts otherwise meet the plain requirements of 11 U.S.C. § 523(a)(7). Because the ability to ensure that such debts are excepted from discharge is of crucial interest to the States in ensuring that the enforcement mechanisms of their laws are

not subverted by bankruptcy filings, this holding of the lower court should be reversed if this Court believes that the bankruptcy court could properly take jurisdiction over the determination.

A. The Fourth Circuit's Decision Ignores The Plain Meaning Of 11 U.S.C. § 523(a)(7).

The Bankruptcy Code explicitly excepts from discharge *any* "fine, penalty or forfeiture" which is payable to and for the benefit of a governmental unit provided it is "not compensation for actual pecuniary loss." *See* 11 U.S.C. § 523(a)(7). The bail bond forfeitures at issue here are (1) forfeitures; (2) payable to a governmental unit; and (3) not for actual pecuniary loss. As such they are covered by the plain language of the exception. Refusing to apply that plain meaning and importing an additional requirement is simply a form of judicial legislation – a process that this Court has repeatedly denounced and which should not be allowed here. *See United States v. Noland*, 517 U.S. 535, 542 (1996); *Patterson v. Shumate*, 504 U.S. 753, 761-62 (1992); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *Hubbard v. United States*, 514 U.S. 695, 700-701 (1995); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 400, 481 (1989). There is no legal basis for distinguishing between the various types of forfeitures to which Section 523(a)(7) may apply. If Congress wishes to limit this exception to only those forfeitures that are quasi-criminal or serve a purely punitive purpose, it is, of course, free to do so, but such a limitation should not be unilaterally imposed by the courts.

As this Court has often explained, "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917)). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal

application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Ron Pair Enterprises*, 489 U.S. at 242 (citation omitted). *See also, Toibb v. Radloff*, 501 U.S. 161, 162 (1991) (where the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language, and then to the legislative history, only if the statutory language is unclear); *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (the Court must give effect to the unambiguously expressed intent of Congress).

B. The Fourth Circuit's Opinion Misconstrues This Court's Opinion In *Kelly v. Robinson*[13] And The Nature Of A "Penal" Obligation.

The Fourth Circuit's conclusion that the Commonwealth's debt is subject to discharge, despite its falling within the literal language of Section 523(a)(7) is based on two fundamental errors. First, the circuit court errs in finding that there is an implicit restriction that limits the discharge exception to only those obligations " . . . that are essentially penal in nature." App. at 18. Second, the court errs in holding that an obligation is only "penal" if it includes some element of misconduct by the debtor, above and beyond the elements set out in Section 523(a)(7).

The first error is based on the court's misreading of this Court's decision in *Kelly v. Robinson*, 479 U.S. 36, 51 (1986). In particular, it focused on the statement in *Kelly* that the exception broadly covered "all penal sanctions, whether they be denominated fines, penalties, or forfeitures." While the quotation is accurate, its application in this context stands *Kelly* on its head. In *Kelly*, the issue was whether a restitution obligation, imposed as a condition of probation in a State criminal proceeding, was

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[13] 479 U.S. 36 (1986).

nondischargeable under § 523(a)(7), even though such a debt is not explicitly mentioned in the language of the exception. Because the restitution there was part of the overall criminal sentencing process of the State, this Court held that it was a penal measure, akin to the fines and penalties covered by the section, and would be excepted from discharge even though not explicitly referred to therein. There is nothing, however, in *Kelly* – which extends Section 523(a)(7) to cover additional debts – that suggests that it should be read to deny that a debt covered by the plain meaning of the section should be dischargeable unless it also satisfies some other, undefined, "penal" purpose. Indeed, if only "penal" forfeitures are covered by Section 523(a)(7), there would seem to be no need to refer to them at all in that they would already be covered by the term "penalties."

The Fourth Circuit further errs by defining a "penal" obligation as one which must be based on some form of misconduct by the debtor. Judge Learned Hand succinctly rebutted exactly that argument in discussing a similar dispute under the Bankruptcy Act with respect to a "recognizance for bail" forfeited by a bondsman who filed for bankruptcy.[14] In *In re Caponigri*, 193 F. 291, 292-293 (D.N.Y. 1912), Judge Hand explained:

> The recovery on a recognizance for bail is essentially the recovery of a penalty, and is a forfeiture. In substance, an obligation is penal when its amount is measured neither by the obligee's loss nor by the valuation placed by him upon what he has given in exchange. . . . [The amount of the bond] had, of course, no relation to a loss suffered by the United States or anything given by it; for it is perverted to regard the failure to

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[14] While these cases were decided under the Bankruptcy Act, the issue is largely identical, in that the Act also excepted from discharge debts that were "a penalty or forfeiture." *See* Section 57(j) of the Bankruptcy Act of 1898.

> try the defendant as being valued by the United States at so much money, or his temporary freedom from arrest as being exchanged for the sum of the recognizance. . . . "Penalty and forfeiture" may mean only punishment for crime or they may be used generally. I think they are used so here. . . .

See also, In re Weber, 106 N.E. 58 (N.Y. 1914) (bail bond was not given to indemnify the State against pecuniary loss but to insure the appearance of the accused). As with *Caponigri*, the debtor here has been required to forfeit a sum based on his failure to satisfy his obligations to the government. The sum bears no relationship to any specific "loss" to the government that can be calculated in dollar terms or that can be measured on the basis of a contract. Instead, the government has lost the ability to ensure that criminals will be brought to trial in a timely fashion. Under the Code, that is sufficient to make the Commonwealth's claim exempt from discharge.[15]

By equating the role of the bondsman with that of a commercial surety for a debt owed (*see* App. at 17) the Fourth Circuit falls into the same error that Judge Hand rejected. The bond is not set because the State is owed money by the debtor or the defendant; rather, as Judge Hand stated, "The sum was fixed at so much that its prospective loss would presumably coerce the defendant to appear *or the bail [bondsman] to produce him.*" 103 F. at 292 (emphasis supplied). It is precisely that obligation, and not merely the duty to pay money, that caused the

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[15] In any event, it is not clear that one may not characterize the failure to ensure the presence of the criminal defendant as a form of misconduct, or at least nonfeasance by the bail bondsman, so as to satisfy the Fourth Circuit's newly imposed requirement. It is the Commonwealth's position, however, that no such obligation is imposed by the Code and it should not be required to prove such a matter in order to receive the benefit of the plain meaning of the language of the Code.

default and the forfeiture of the bond. To equate that role of a surety with a purely contractual obligation denigrates the importance to the State of assuring that it will be able to try the accused and, if convicted, incarcerate those who are a danger to society.

This issue is one of exceptional importance because the Fourth Circuit's decision in this case calls into question the dischargeability of *all* forfeitures, except those owed by a criminal or other conceded wrongdoer. At a minimum, this exposes States to the increased likelihood of litigation over any debt owed to the State as a result of a civil matter, even when the debt is plainly denominated as a fine, penalty or forfeiture. The reasoning of the lower court could be extended to the language in Section 523(a)(7) that excepts "fines" from discharge, leaving the States open to arguments by debtors in every instance in which they seek to collect a fine that the debt at issue is not really a "penal" fine and, therefore, is not covered by the exception. This would substantially impede the States' right to collect forfeitures and other debts owed to them, in ways not contemplated by the Bankruptcy Code and Rules. While there is not yet a circuit split on this issue, the bankruptcy courts are widely divided, as noted in the Fourth Circuit's opinion.[16] App. at 15-16. In light of the crucial role that bail bondsmen play in the States' criminal justice system, the issue plainly needs to be resolved sooner rather than later. Moreover, when combined with the remainder of the decision, which allows a debtor to force a State into litigation over this issue in bankruptcy court, despite the limits of the Eleventh Amendment, the Fourth Circuit's opinion creates a perilous opportunity for debtors to delay and burden the

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[16] Also *see Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 n. 4 (1990), where this Court suggests that section 523(a)(7) applies to civil, as well as criminal, fines, penalties and forfeitures.

State's legitimate effort to collect sanctions imposed on them.

CONCLUSION

Accordingly, the Commonwealth of Virginia, et al., request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: HERBERT M. COLLINS; In Re: UWANDOLYN BLACKWELL COLLINS, *Debtors,*	
COMMONWEALTH OF VIRGINIA; COMMONWEALTH OF VIRGINIA, ex rel City of Norfolk; COMMONWEALTH OF VIRGINIA, ex rel Norfolk General District Court, *Plaintiffs-Appellants,* v. HERBERT M. COLLINS; UWANDOLYN BLACKWELL COLLINS, *Defendants-Appellees,* UNITED STATES OF AMERICA, *Intervenor.*	No. 97-1580

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Senior District Judge.
(CA-96-1195-2, BK-90-22976-S)

Argued; October 26, 1998

Decided: April 5, 1999

Before MICHAEL, and MOTZ, Circuit Judges, and BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion, Judge Michael wrote the opinion, in which Judge Motz and Chief Judge Boyle joined.

COUNSEL

ARGUED: Edward Meade Macon, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellants. Frank James Santoro, MARCUS, SANTORO, KOZAK & MELVIN, P.C., Portsmouth, Virginia, for Appellees. Henry Thomas Byron, III, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. **ON BRIEF**: Mark L. Earley, Attorney General of Virginia, Judith W. Jagdmann, Deputy Attorney General, E. Suzanne Darling, Senior Assistant Attorney General/Special Assistant Norfolk Commonwealth's Attorney, Susan W. Atkinson, Assistant Attorney General/Special Assistant Norfolk Commonwealth's Attorney, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; Melvin R. Zimm, GLASSER & GLASSER, P.L.C., Norfolk, Virginia, for Appellants. Karen M. Crowley, MARCUS, SANTORO, KOZAK & MELVIN, P.C., Portsmouth, Virginia, for Appellees. Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor.

OPINION

MICHAEL, Circuit Judge:

Herbert Collins was once a bail bondsman in Virginia. He and his wife filed for bankruptcy in 1990 and were released from all of their legally dischargeable debts. Thereafter, the Commonwealth of Virginia sought to collect on pre-bankruptcy judgments entered against Mr. Collins for forfeited bail bonds. Giving notice to the Commonwealth, the Collinses moved to reopen their bankruptcy case for a determination that the bail bond debt was dischargeable. The bankruptcy court held that the debt was discharged, and the district court affirmed. The Commonwealth appeals, asserting for the first time its sovereign immunity under the Eleventh Amendment. We hold (1) that the Eleventh Amendment is not implicated because there was no suit against the Commonwealth and (2) that Mr. Collins's obligation as surety on the forfeited bail bonds is dischargeable in bankruptcy. We therefore affirm.

I.

In the 1980s Mr. Collins was a (licensed) professional bail bondsman in Norfolk, Virginia. In this capacity Mr. Collins signed as surety on appearance bonds for many defendants in state criminal cases in the Norfolk General District Court. His premium or fee was based on a percentage of the face amount of the bond. Mr. Collins failed to pay off the bonds of some defendants for whom he was surety after they skipped their court appearances. As a result, in the late 1980s the Commonwealth of Virginia, acting on its own behalf and on behalf of the City of

Norfolk and the Norfolk General District Court (collectively, the "Commonwealth") obtained judgments against Mr. Collins totaling over $37,000 for these unpaid bond obligations.

On June 20, 1990, Mr. Collins and his wife filed a Chapter 7 bankruptcy petition in the Eastern District of Virginia. Listed on their schedule of unsecured liabilities was a debt of $37,130 to the Commonwealth for the forfeited bail bonds. The Commonwealth received notice of the filing and did not file a proof of claim. (This was a no-asset bankruptcy.) On October 11, 1990, the bankruptcy court entered an order releasing the Collinses "from all dischargeable debts." The Commonwealth had notice of the discharge and did not object. More than four years later (in February 1995) the Commonwealth, in spite of the discharge order, commenced garnishment proceedings against Mr. Collins to collect on the judgments arising out of his unpaid obligations as surety on forfeited bail bonds.

In August 1996 the Collinses filed a motion to reopen their bankruptcy case for a determination of whether the judgment debt from the bail bonds was dischargeable. Although the Commonwealth was mailed a copy of the motion, it was not named as a defendant in any adversary proceeding or served with process. The Commonwealth filed an objection to the motion to reopen, contending that the debt represented a penalty that was nondischargeable under 11 U.S.C. § 523(a)(7). After a hearing in which the Commonwealth participated, the bankruptcy court (in a single order) granted the motion to reopen and held that the debt was dischargeable. The district court affirmed, and the Commonwealth now

appeals to us, raising a new issue. It asserts Eleventh Amendment immunity, arguing that this amendment strips a bankruptcy court of jurisdiction to reopen a case and determine (in conjunction with the decision to reopen) the dischargeability of a debt owed to a state. In the alternative, the Commonwealth continues to argue that a bail bondsman's obligation is nondischargeable in bankruptcy.

Because of the constitutional challenge to federal bankruptcy jurisdiction, we granted the motion of the United States to intervene in this appeal on behalf of the Collinses.

II.

We turn first to the Commonwealth's claim of Eleventh Amendment immunity. The amendment provides, "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This bar to federal jurisdiction also extends to suits against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890). The Eleventh Amendment thus confirms that each state is a sovereign unit in our federal system and that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the state's] consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (citation omitted).

The Commonwealth did not claim sovereign immunity in the bankruptcy or district court, but "the Eleventh Amendment defense sufficiently partakes of the nature of

a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974). We will therefore consider the Commonwealth's defense.

We have dealt with the applicability of the Eleventh Amendment to bankruptcy proceedings in two recent cases. The Commonwealth relies on one of the cases, *Schlossberg v. Maryland*, 119 F.3d 1140 (4th Cir. 1997), and the Collinses and the United States rely on the other, *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir.), *cert. denied*, 118 S. Ct. 1517 (1997). Because these two cases guide our decision, we will discuss them in some detail.

In *Schlossberg* the bankruptcy trustee filed an adversary proceeding in bankruptcy court against the State of Maryland to avoid as a preference certain income tax payments made by the debtor to the state within 90 days of the filing of the Chapter 7 petition. The state won in the bankruptcy and district courts on its argument that the income tax payment was made in the ordinary course of business. When the trustee appealed to this court, the state contended that it was immune from the trustee's suit under the Eleventh Amendment. In response the trustee argued that 11 U.S.C. § 106, enacted as part of the Bankruptcy Reform Act of 1994, abrogates the immunity of states in several instances, including trustee suits under 11 U.S.C. § 547 to avoid preferential transfers. We began our analysis in *Schlossberg* with the question dictated by the Supreme Court in *Seminole Tribe:* was § 106 of the Bankruptcy Code " 'passed pursuant to a constitutional provision granting Congress the power to abrogate?' " *Schlossberg*, 119 F.3d at 1145 (quoting *Seminole Tribe*, 517 U.S. at 59). The trustee argued that Congress

had the authority to enact § 106 (and thereby abrogate state sovereign immunity) under an Article I power, the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4.[1] We disagreed, pointing out that *Seminole Tribe* made clear that the Eleventh Amendment restricts judicial power under Article III. "[T]o give the Eleventh Amendment effect," we said, "Congress' powers under Article I cannot be construed to empower it to expand federal jurisdiction by abrogating the states' sovereign immunities." *Schlossberg*, 119 F.3d at 1145. We therefore held that "Congress has no authority under the Bankruptcy Clause . . . to abrogate state sovereign immunity in federal courts." *Id.*

The United States as intervenor in *Schlossberg* asked us to uphold § 106's immunity abolition on another ground, that is, on the authority granted Congress by § 5 of the Fourteenth Amendment. We noted that *Seminole Tribe* acknowledged § 5 of the Fourteenth Amendment as a legitimate source of congressional power to abrogate states' immunities.[2] However, we found "no evidence

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[1] The Bankruptcy Clause states, "The Congress shall have Power . . . To establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

[2] The Fourteenth Amendment, which was ratified 70 years after the Eleventh Amendment, takes back some of the limitations of the earlier amendment. The Supreme Court in *Seminole Tribe* explained that the Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe*, 517 U.S. at 59. Section 5 of the Fourteenth Amendment expressly grants Congress the power "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Therefore, "when acting pursuant to § 5 of the Fourteenth

that Congress either passed [§ 106 of] the Bankruptcy Code under § 5 of the Fourteenth Amendment or sought to preserve the core values specifically enumerated in that amendment." *Schlossberg*, 119 F.3d at 1147. Because Congress could not rely on Article I's Bankruptcy Clause and did not rely on § 5 of the Fourteenth Amendment, we held that the attempt to abrogate the states' Eleventh Amendment immunity through the enactment of § 106 was "unconstitutional and ineffective." *Id.* at 1147. As a result, in the absence of Maryland's consent, the federal courts lacked jurisdiction to entertain the trustee's action against the state to avoid the debtor's preferential tax payment.

In *Antonelli* the State of Maryland[3] claimed that the Eleventh Amendment immunized it from the terms of a Chapter 11 reorganization plan. Under the plan the debtors' real property (about 150 parcels) was transferred into a liquidating trust, the trust marketed the property, and the proceeds were distributed pursuant to the plan. The plan provided that the debtors' transfer of property to the trust and the trust's sales to third parties were to be exempt from state and local transfer taxes pursuant to 11 U.S.C. § 1146(c) (exempting plan transfers from "state stamp or similar tax"). The state, as a creditor, was served with a copy of the proposed plan, and it did not file any

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Amendment, Congress can abrogate the Eleventh Amendment without the States' consent." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

[3] For convenience we use "State of Maryland" or "state" to refer to the State of Maryland and the two Maryland counties involved in *Antonelli*.

objection. Deeds reflecting the transfers from the debtor to the trust and from the trust to third-party purchasers were all recorded with a notation claiming exemption from transfer and recordation taxes. After a year had passed, the state sued the trust and certain of the third-party purchasers to recover transfer and recordation taxes. After the district court rejected the state's claim, it appealed to this court.

On appeal in *Antonelli* the State of Maryland claimed that the Eleventh Amendment barred the bankruptcy court from exercising jurisdiction over a state in a proceeding to confirm a plan of reorganization. Therefore, according to the state, it was not bound by the order confirming the plan. We disagreed for several reasons. First, we noted that the confirmation order was not entered in a suit against the state. The state was not named as a defendant or served with process requiring it to appear in federal court. The situation, we said, was therefore distinguishable from *Schlossberg*, where the state was summonsed to appear upon being sued by the trustee in an adversary proceeding in bankruptcy court. Second, we said that "the power of the bankruptcy court to enter an order confirming a plan . . . derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates." *Antonelli*, 123 F.3d at 787 (citation omitted). Finally, we pointed out that the state, which had notice of the proposed plan, was free either to stay out of court or to submit to federal jurisdiction and challenge the plan:

> It is true that if a state wishes to challenge a bankruptcy court order of which it receives

> notice, it will have to submit to federal jurisdiction. . . . The state, of course, well may choose not to appear in federal court. But that choice carries with it the consequence of foregoing any challenge to the federal court's actions. While forcing a state to make such a choice may not be ideal from the state's perspective, it does not amount to the exercise of federal judicial power to hale a state into federal court against its will and in violation of the Eleventh Amendment. Instead, it is the result of Congress' constitutionally authorized legislative power to make federal courts the exclusive venue for administering the bankruptcy law.

Id. at 787. For all of these reasons we held that the Eleventh Amendment did not prevent the bankruptcy court from confirming a plan of reorganization that was binding upon the State of Maryland.

We believe that the case now before us is controlled by *Antonelli* and not by *Schlossberg*. The Collinses' motion to reopen was not a suit against the Commonwealth of Virginia, just like the plan confirmation proceeding in *Antonelli* was not a suit against the State of Maryland. In addition, the bankruptcy court here had jurisdiction to determine the dischargeability of a debt to the Commonwealth, just as the court in *Antonelli* had jurisdiction to confirm a plan of reorganization that affected Maryland's rights as a creditor. We will explain in more detail.

The Collinses filed a motion to reopen their case under § 350(b) of the Bankruptcy Code. That section allows the bankruptcy court to reopen a case "to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). An adversary proceeding, with its compulsory process, is

not required to reopen a case because the bankruptcy court's power to reopen flows from its jurisdiction over debtors and their estates. *See Antonelli*, 123 F.3d at 787. A motion to reopen may be filed by "the debtor or other party in interest." Fed. R. Bankr. P. 5010. Here, a copy of the Collinses' motion was served by mail on the Commonwealth. The Commonwealth, however, was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court. The Commonwealth was free to respond to the motion or ignore it. In these circumstances, the motion to reopen was not a suit "against one of the United States" within the meaning of the Eleventh Amendment. *See Antonelli*, 123 F.3d at 787.

The Commonwealth chose to appear in bankruptcy court and oppose the Collinses' motion to reopen on the ground that the bail bond debt was nondischargeable. At that point there was still no suit against the Commonwealth, but there is a question whether the bankruptcy court in determining dischargeability in conjunction with the decision to reopen transformed the proceeding into a suit against Virginia within the meaning of the Eleventh Amendment. We do not believe that the proceeding here ever became a suit "against one of the United States."

A federal court's jurisdiction over the dischargeability of debt, just like its jurisdiction to confirm a plan of reorganization, "derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates." *Antonelli*, 123 F.3d at 787; *see also Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Spartan Mills v. Bank of America Illinois*, 112 F.3d 1251, 1255

(4th Cir.), *cert. denied*, 118 S. Ct. 417 (1997). Once a bankruptcy petition is filed, the bankruptcy court has jurisdiction over the case with authority to resolve all claims against the estate and discharge the debtor, regardless of whether a state is a creditor. *See Gardner v. New Jersey*, 329 U.S. at 572; *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929).

Our bankruptcy system is often described as a collective mechanism for resolving the claims of creditors and relieving the debtor of his legally dischargeable debts. In the traditional case the debtor turns his assets over to a trustee for liquidation and the payment of dividends to creditors according to their statutory priorities. If a state is a creditor, "[b]ankruptcy law modifies the state's collection rights with respect to its claims against the debtor, but it also affords the state an opportunity to share in the collective recovery." *Texas v. Walker*, 142 F.3d 813, 822 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999). Of course, if the state wishes to participate in the recovery, it must file a proof of claim in bankruptcy court. It has long been held that when a state is a creditor, bankruptcy procedure for proof and allowance of claims does not operate as a suit against the state in violation of the Eleventh Amendment. Nothing compels the state to submit to the jurisdiction of the federal bankruptcy court, and the court's power to allow or deny a state's claim derives from the court's jurisdiction over the bankruptcy estate. In short, if a state wishes to share in the estate, it must submit to federal jurisdiction. *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933) ("The federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must

submit to appropriate requirements by the controlling power. . . . "); *Texas v. Walker,* 142 F.3d at 822 ("Bankruptcy operates by virtue of the Supremacy Clause and without forcing the state to submit to suit in federal court.").

While the bankruptcy system gives creditors an opportunity to share in the estate, the debtor receives an overriding benefit. In return for submitting to the bankruptcy process, the debtor is discharged of his legally dischargeable debts. Even though the debtor (like the Collinses) has no assets to hand over, he is still entitled to a discharge order. The discharge order clears all dischargeable debts, including those owed to a state. Although this alters the state's legal rights, the discharge order is not entered in a suit against the state. The order does not depend on bankruptcy court jurisdiction over the state; as we have indicated, it is based on the court's jurisdiction over the debtor and his estate. *See id.* at 823 ("the granting of a bankruptcy discharge does not offend the Eleventh Amendment"); *Antonelli,* 123 F.3d at 787.

The power of bankruptcy courts to discharge debt is fundamental to our bankruptcy system. If a state could assert Eleventh Amendment immunity to avoid the effect of a discharge order, the bankruptcy system would be seriously undermined. A person owing debts to a state could never have those debts discharged by a bankruptcy court unless the state agreed. Debtors owing money to states could not be assured of the opportunity for a "fresh start" heretofore guaranteed by the bankruptcy laws. As the Supreme Court has said, the purpose of the bankruptcy laws is to "give[ ] to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for

future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This purpose can be fulfilled today only if the bankruptcy courts retain the power to discharge debts, including debts owed to states, consistent with established federal supremacy with respect to bankruptcy. *See Irving Trust Co.*, 288 U.S. at 333; *Antonelli*, 123 F.3d at 787.

The Commonwealth argues that these basic principles are beside the point in the Collinses' case. According to the Commonwealth, when the bankruptcy court determined dischargeability in conjunction with the motion to reopen, it transformed the case into an adversary proceeding against the Commonwealth in violation of the Eleventh Amendment. We disagree. This was not an adversary proceeding because there was no action to compel the Commonwealth to come into court. The court did not issue any process summonsing the Commonwealth to appear. While the Commonwealth was served with notice of the motion to reopen, it was free to stay away from bankruptcy court or to appear for the hearing. We recognize that this put the Commonwealth in a tough spot. It could decline to appear and thereby forego the opportunity to make its argument and challenge any decision. On the other hand, it could voluntarily submit to federal jurisdiction and take part in the proceedings. Forcing the Commonwealth to make such a choice "does not amount to the exercise of federal judicial power to hale a state into federal court against its will and in violation of the Eleventh Amendment." *Antonelli*, 123 F.3d at 787. Again, the Commonwealth was not summonsed to appear in the proceedings brought on by the Collinses'

motion to reopen. Moreover, the bankruptcy court did not need to assert jurisdiction over the Commonwealth to determine the dischargeability of the bail bond debt in conjunction with its decision to reopen. The court had the power to do that because it had jurisdiction over the debtors and their case. *See Texas v. Walker*, 142 F.3d at 822 (noting that a bankruptcy case cannot be "equat[ed] . . . with a suit against the state"); *Antonelli* 123 F.3d at 787. The Eleventh Amendment was not implicated.

III.

We now consider whether Mr. Collins's suretyship obligation on the bail bonds is dischargeable in bankruptcy. Section 523 of the Bankruptcy Code provides that a discharge does not release an individual debtor from any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). We believe that Mr. Collins's debt for the bail bonds is not a "fine, penalty, or forfeiture" within the meaning of Section 523(a)(7). Therefore, this debt is dischargeable in bankruptcy.

Bankruptcy courts that have considered the dischargeability of bail bond debts have reached different conclusions. Some courts have held that these debts are dischargeable in bankruptcy, finding them more akin to a contractual obligation than a "penalty" or "forfeiture." *See In re Damore*, 195 B.R. 40 (Bankr. E.D. Pa. 1996); *In re Midkiff*, 86 B.R. 239 (Bankr. D. Colo. 1988); *In re Paige*, No. 86 B 8072 C, 1988 WL 62500 (Bankr. D. Colo. Apr. 15, 1988). Other courts have held that the debts are not

dischargeable, citing concerns about the effective functioning of the bail system. *See In re Scott*, 106 B.R. 698, 701 (Bankr. S.D. Ala. 1989) (noting that discharge would "thwart the public welfare objectives served by the state's [garnishment] action"); *In re Bean*, 66 B.R. 454, 457 (Bankr. D. Colo. 1986) ("this entire system could be undermined or destroyed if those persons who post appearance bonds may simply discharge their obligations under the protection of the Bankruptcy Code").

The nondischargeable "fine, penalty, or forfeiture" under § 523(a)(7) is an obligation that is essentially penal in nature. The Supreme Court has described this provision as "creat[ing] a broad exception for all *penal* sanctions, whether they be denominated fines, penalties, or forfeitures." *Kelly v. Robinson*, 479 U.S. 36, 51 (1986) (emphasis added). In *Kelly v. Robinson* the Court held that restitution ordered by a court as part of a criminal sentence is nondischargeable under § 527(a)(7), noting that "the decision to impose restitution does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant." *Id.* at 52. It went on to explain that "[u]nlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." *Id.* (quoting *In re Pellegrino*, 42 B.R. 129, 133 (Bankr. D. Conn. 1984)). We applied this same reasoning in *Thompson v. Virginia*, 16 F.3d 576 (4th Cir. 1994), when we held that court costs assessed against a criminal defendant upon conviction are nondischargeable in bankruptcy. We explained that "the assessment of

costs is understood by the Commonwealth as operating hand-in-hand with the penal and sentencing goals of the criminal justice system. The practical operation of the cost-assessment can only be understood in the penal context." *Id.* at 580. These cases, *Kelly v. Robinson* and *Thompson v. Virginia*, confirm that a sanction must be penal to be exempt from discharge under § 523(a)(7). This view is consistent with the intent of the drafters of the Bankruptcy Code, who said, "The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension." H.R. Rep. No. 95-595, at 342 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6299.

The relevant question then is whether Mr. Collins's debt for the unpaid bail bonds is penal in nature. We believe it is not. Under Virginia law surety bonds posted by professional sureties are contractual obligations, subject to the general rules of contract law. *Board of Supervisors v. Safeco Ins. Co.*, 226 Va. 329, 336, 310 S.E.2d 445, 449 (1983). Mr. Collins was licensed by the Commonwealth as a professional bail bondsman (or surety). Under this authority he executed appearance bonds for criminal defendants in exchange for premiums. He voluntarily assumed the role of surety for his principals by means of a contractual obligation to the Commonwealth. As the Seventh Circuit has said, "[t]he bond is a contract between the surety and the government that if the latter will release the principal from custody the surety will undertake that the principal will appear personally at any specified time and place to answer." *United States v. Davis*, 202 F.2d 621, 625 (7th Cir. 1953). Mr. Collins's debts

to the Commonwealth arose when certain of his principals failed to show up for trial or other proceedings. What the bankruptcy court said in *In re Paige* describes the nature of Mr. Collins's debts: "It cannot be said that [he] was being punished by virtue of incurring these [bail bond] obligations. [He] committed no criminal or penal act which gave rise to such debts. These bail bond forfeiture obligations, as to [him], arose from a purely financial and contractual arrangement." 1988 WL 62500, at *4.[4] When the bondsman incurs liability for the full amount of bail upon his principal's failure to appear in criminal court, we refer to this colloquially as "forfeiting" the bond. It does not matter, however, that § 523(a)(7) includes the term "forfeiture" in its list of nondischargeable debts; this section, as we have said, excludes from bankruptcy discharge only debts that are essentially penal in nature. From the standpoint of the bondsman, the "forfeiture" of a bail bond is more akin to triggering liquidated damages for breach of his contract with the state than it is to triggering a penal sanction against him. Indeed, losses on bail bonds when criminal defendants abscond are an inevitable cost of doing business for the professional bondsman. We therefore conclude that Mr. Collins's bail bond debt arose from a contractual obligation and was not a "fine, penalty, or forfeiture" within the meaning of § 523(a)(7).

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[4] Although we hold that the bail bond obligations of a professional bondsman are dischargeable, the criminal defendant himself is not entitled to a discharge on his bail bond forfeiture. As far as the defendant is concerned, the forfeiture amounts to a penalty imposed on him for his failure to appear in court. *See In re Paige*, 1988 WL 62500, at *4.

The Commonwealth expresses concern that its bail system will be undermined if bondsmen may discharge their bond obligations in bankruptcy. We are sensitive to this concern, but we do not believe that we are creating a problem. Virginia law subjects bail bondsmen to heavy regulation. *See* Va. Code Ann. § 19.2-152.1 (Michie 1950). Before an applicant can be licensed as a professional bail bondsman, a local circuit judge must certify that he is suitable to engage in that business. Thereafter, there are a number of steps the Commonwealth can take to ensure that a particular bondsman's bail bonds are adequately collateralized. For example, he may be required to execute a deed of trust on his real estate in favor of the Commonwealth to secure the expected limit of his bond obligations. Or, he may be required to place a sufficient amount of cash or negotiable instruments in escrow with the clerk of court. Bondsmen licensed after July 1, 1989, must automatically provide $200,000 in collateral. There is a mechanism for the Commonwealth to monitor the individual bondsman's obligations: each month the bondsman must file with the clerk a list of his outstanding bonds with their amounts noted. *See id.* In short, there are sufficient safeguards available for the Commonwealth to ensure that its bail bondsmen are financially sound and that they provide adequate security to cover any default. We are therefore satisfied that our holding will not place Virginia's bail system in jeopardy.

We hold that the judgments against Herbert Collins for his unpaid suretyship obligations on bail bonds are dischargeable in bankruptcy.[5]

IV.

The judgment of the district court is affirmed.

AFFIRMED.

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[5] The United States suggests that state officials may be enjoined under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), from taking action to collect a debt in violation of a bankruptcy court's discharge order. That issue is not before us today.

AO 450 (Rev. 5/85) Judgment In a Civil Case

United States District Court

EASTERN DISTRICT OF VIRGINIA

Norfolk Division

COMMONWEALTH OF VIRGINIA EX REL. CITY OF NORFOLK, et al.,

Appellants,

v.

HERBERT MARTEL COLLINS, et al.,

Appellees.

JUDGMENT IN A CIVIL CASE

(Filed April 2, 1997)

CASE NUMBER: 2:96cv1195

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the bankruptcy court's November 8 order is **AFFIRMED** in all respects.

April 2, 1997
Date

Norman H. Meyer, Jr.
Clerk

/s/ Tammy K. Armstrong

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE
HERBERT MARTEL
COLLINS, UWANDOLYN
BLACKWELL COLLINS,

Debtors.

Bankruptcy Case No.
94-25678-A

COMMONWEALTH OF
VIRGINIA,
COMMONWEALTH OF
VIRGINIA, Ex. Rel. CITY
OF NORFOLK,

Appellants,

v.

HERBERT MARTEL
COLLINS UWANDOLYN
BLACKWELL COLLINS,

Appellees.

Action No.
2:96cv1195

OPINION AND ORDER

(Filed April 2, 1997)

I. Facts and Procedural Posture

The facts relevant to this appeal are undisputed. On June 20, 1990, the debtors, Herbert and Uwandolyn Collins, filed for personal bankruptcy under Chapter 7, and several months later they obtained a discharge of their debts. Prior to filing for bankruptcy, Mr. Collins had been a bail bondsman in the City of Norfolk for criminal defendants under the jurisdiction of the Norfolk General

District Court. The Commonwealth of Virginia ex rel. City of Norfolk and the Commonwealth of Virginia ex rel. Norfolk General District Court (collectively referred to as "the Commonwealth") had obtained several judgements against Mr. Collins, based on his failure to pay the bonds of criminal defendants for whom he had acted as bondsman and who had failed to appear in court. When the debtors filed for bankruptcy, they listed the Commonwealth's unsecured claim of $37,130 in their petition.

Nevertheless, taking the position that the debt was not dischargeable in bankruptcy, in February 1996 the Commonwealth instituted garnishment proceedings to recover the judgments. The debtors, arguing that these debts had been discharged in bankruptcy, moved the bankruptcy court to reopen the case in order to determine the dischargability of the debt. In an order entered on November 8, 1996, Judge St. John, United States Bankruptcy Judge, reopened the case and declared the debt dischargeable.

The Commonwealth appealed, raising two questions. First, the Commonwealth contends that its judgment against Mr. Collins is not dischargeable. Second, the Commonwealth claims that the Bankruptcy Court abused its discretion by reopening the case. For the reasons detailed below, the Court **AFFIRMS** the bankruptcy court's November 8 order in all respects.

II. The Dischargability of the Debt

The Commonwealth contends that the judgments it has against Mr. Collins were not properly dischargeable, because they represent a forfeiture. The Bankruptcy Code

provides that a discharge does not discharge an individual debtor from any debt to the extent that such debt

(a) is for a fine, penalty, or forfeiture

(b) payable to and for the benefit of a governmental unit, and

(b) is not compensation for actual pecuniary loss.

11 U.S.C.A. § 523 (a)(7) (West 1993). In order for a debt to be non-dischargeable under this provision, it must meet all three requirements. *Thompson v. Commonwealth (In re Thompson)*, 16 F.3d 576, 577 (4th Cir.), *cert. denied*, 114 S.Ct. 2709 (1994).

Due to the Bankruptcy Code's policy of granting a fresh start to debtors, the presumption is that all debts are dischargeable in bankruptcy. *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164-65 (11th Cir. 1995). Any exceptions to discharge are construed strictly in accordance with the policy of giving a fresh start to the debtor. *New Neighborhoods, Inc. v. W. Va. Workers' Compensation Fund*, 886 F.2d 714, 719 (4th Cir. 1989). Therefore, as a rule of construction, § 527(a)(7) must be construed narrowly in accordance with the presumption of dischargability.

Because the facts are not in dispute, this issue is purely a question of law, which the Court reviews de novo. *In re Tudor Assoc., Inc., II*, 20 F.3d 115, 119 (4th Cir. 1994).

We hold that with respect to a professional bail bondsman like Mr. Collins, a judgment for a bond forfeited by virtue of a criminal defendant's failure to appear for trial is not a "fine, penalty, or forfeiture"

within the meaning of § 523(a)(7) and therefore that the debt was properly discharged.

The Commonwealth has made much of the fact that when a bonded defendant fails to appear for trial, the bond is said to be forfeited, both when it is put up by the criminal defendant and when it is put up by a professional bondsman. The Commonwealth concludes that the plain language of the statute therefore requires a finding of non-dischargability for all debts termed "forfeitures" and exhorts the Court to interpret the statute so as to give meaning to this term. However, the Court finds that the cases interpreting § 523(a)(7) teach us that the character and nature of the debt are more important than the language used to describe it.

For instance, in *Thompson*, the Fourth Circuit observed that even though there was a line of Virginia Cases unequivocally holding that the imposition of court costs are not part of the criminal sentence, the way in which the costs were actually collected and administered suggested that they were more than mere repayment of expenses incurred by the state. Accordingly, the court held that court costs assessed against a convicted defendant are a non-dischargeable penalty under § 523(a)(7). *Kelly v. Robinson*, 479 U.S. 36 (1986) dealt with the dischargability of an order by a state court that a convicted welfare fraud to [sic] make restitution to the state. The Supreme Court concluded that the order of restitution was for the exact amount by which the state had been defrauded, it was not dischargeable, because it was penal in nature and not "compensation for actual pecuniary

loss." Therefore, the Court concludes that the label "forfeiture" does not settle the question of whether the Collins's debt is dischargeable. It is necessary to inquire into the nature of a surety's bond and the purpose for its forfeiture to the Commonwealth upon default.

When a professional bail bondsman acts as a surety for a criminal defendant, the bondsman takes a fee from the defendant and promises to pay the amount of the bond to the Commonwealth if the defendant does not appear for trial. From time to time, when a defendant for whom the bondsman acted as surety fails to appear for trial, the bondsman must pay the Commonwealth. Although this is spoken of as "forfeiting" the bond, for the bondsman it is merely a cost of doing business, and not a true forfeiture at all. A forfeiture is a "divestiture of property without compensation, in consequence of a default or an offense, and is a method deemed necessary by the legislature to restrain the commission of an offense and to aid in its prevention." 36 Am. Jur. 2d *Forfeitures and Penalties* § 1 (1968). The surety has been compensated, in advance, for the risk of the defendant's non-appearance. Moreover, if a surety's principal does not appear for trial, the surety has committed no offense that would justify a forfeiture of the surety's property. The statute specifically allows the surety to require collateral or other security from his principal in order to indemnify the surety against liability. Va. Code Ann. § 19.2-132 (Michie 1995). The fact that the bondsman is permitted to seek indemnification from the criminal defendant is incompatible with the Commonwealth's position in this appeal that Mr. Collins forfeited his bonds within the meaning of § 523(a)(7). Moreover, the failure of the defendant to

appear at trial does not automatically result in forfeiture of the surety's bond. Va. Code Ann. § 19.2-149 (surety discharged from liability if surety arrests the criminal defendant and surrenders him to the court).

In contrast, with respect to criminal defendants who post bail using their own property as security for the bond and who fail to meet the conditions of the bond, it is clear that the bond is forfeited within the meaning of § 523(a)(7). Absconding defendants have committed an offense, bail jumping, for which they may be criminally prosecuted, in addition to suffering forfeiture of their bonds. Va. Code Ann. § 19.2-128 (Michie 1995). In fact, Virginia law refers to the *defendant* incurring a forfeiture, rather than the surety. Va. Code. Ann. § 19.2-128 ("Whoever, having been released pursuant to this chapter . . . willfully fails to appear before any court or judicial officer as required, shall . . . incur a forfeiture of any security which may have been given or pledged for his release. . . . "

The Supreme Court, has said that the defining characteristic of a debt which is non-dischargeable under § 523(a)(7) is that "[u]nlike an obligation which arises out of a contractual, statutory or common law duty, [a non-dischargeable] obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." *Kelly*, at 52 (quoting *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 B.R. 129, 133 (Bankr. D. Conn. 1984)). The Commonwealth argues that the relationship between the Commonwealth and a professional bondsman is not contractual, because no contractual benefit

flows to the Commonwealth. The Court disagrees. By serving as a surety for criminal defendants, a professional bail bondsman performs functions that would otherwise be performed by government entities, from taking security from bonded defendants to arresting absconding defendants on a capias writ. Therefore, rather than being a true forfeiture, the Court finds that Mr. Collins's debt to the Commonwealth arose out of a contractual relationship and thus should be dischargeable.

As a professional bail bondsman, Mr. Collins acted as surety for the obligations that criminal defendants owed to the Commonwealth. In general, Virginia courts recognize that a surety relationship is contractual. "A surety relationship is based on two separate contractual obligations. The first contract established the debt between the principal debtor and the creditor. The second contract, between the surety and the creditor, secures the principal debt." *Courson v. Simpson*, 468 S.E.2d 17, 20 (Va. 1996). Although in the context of a bail bond, the Commonwealth is not a creditor of the criminal defendant, that does not alter the fact that the surety's relationship with both the Commonwealth and the criminal defendant is a contractual relationship. *See Commonwealth v. Allstate Bonding Co.*, 435 S.E.2d 396, 398 (Va. 1993) (implicitly recognizing that a bail bond constitutes a contract between the surety and the Commonwealth). A bond is defined as "the posting by a person or his surety of *a written promise to pay* a specific sum . . . ordered by an appropriate judicial officer as a condition of bail to assure performance of the terms and conditions contained in the recognizance." Va. Code. Ann. § 19.2-119 (Michie 1995) (emphasis added). Because a bail bondsman enters into a

contract with the Commonwealth when he or she posts a bond on behalf of a criminal defendant, the forfeited security cannot constitute a fine, penalty, or forfeiture under § 523(a)(7).

By holding that a debt owed by a professional bail bondsman to a governmental unit based on the forfeiture of bonds is dischargeable, we find ourselves in concert with the majority of courts that have decided this issue. The leading case is *Pioneer General Ins. Co. v. Paige (In re Paige)*, Adv. No. 87 E 194, Case No. 86 B 8072 C, 1988 WL 62500 (Bankr. D. Colo. 1988). In *Paige*, the debtor was a professional bail bondsman who served as an agent for Pioneer General Insurance Company, which was the surety on the bonds written by Paige. Paige's contract with Pioneer provided that Paige would indemnify the company for all losses arising out of the bonds he wrote, but when several defendants bonded by Paige defaulted, Paige filed for bankruptcy and did not indemnify Pioneer. The court held that Paige's debt to Pioneer was dischargeable. The Commonwealth argues that this case is not on point with the matter before the Court, because the debt at issue in *Paige* was owed to an insurance company rather than to a governmental entity. However, the *Paige* court held that Pioneer was entitled to be subrogated to the claim of the government entities to whom the bonds had been forfeited. *Paige*, 1988 WL 62500, at *2. In short, in *Paige*, as here, the question of dischargeability was decided on the grounds that the debt did not constitute a fine, penalty, or forfeiture. The court held that the case was distinguishable from one in which "a criminal defendant has been fined or otherwise imposed with a

penalty of forfeiture that carries with it a badge of punishment." *Paige*, 1988 WL 62500, at *4. In contrast, the court said that the bail bond forfeiture incurred by the debtor-bondsman arose from a "purely financial and contractual arrangement." *Id.* The reasoning of *Paige* was subsequently adopted and the *Paige* opinion quoted in full in *Pioneer General Insurance Co. v. Midkiff (In re Midkiff)*, 86 B.R. 239 (Bankr. D. Colo 1988). The holding and rationale of *Paige* were recently applied in a case directly on point with the instant appeal in *County of Berks v. Damore (In re Damore)*, 195 B.R. 40 (Bankr. D. Pa. 1996). In *Damore*, the court held that a professional bondsman's debt to a governmental entity for forfeited bail bonds was dischargeable under § 523(a)(7).

The Commonwealth relies on *Scott v. Alabama (In re Scott)*, 106 B.R. 698 (Bankr. S.D. Ala. 1989), which held that proceedings to collect on a forfeited bail bond were not stayed by the filing of a petition in bankruptcy and that such a debt was non-dischargeable pursuant to § 523(a)(7). We do not find the *Scott* case particularly helpful, because it provides no analysis of the dischargability question, and omits several crucial facts, such as whether the debtor was a professional bondsman and whether forfeiting the debtor's bond was reasonably related to an ongoing attempt to bring the absconding defendant to justice. Accordingly, rather than address *Scott* directly, we will focus on the primary authority on which the *Scott* court relied, *In re Bean*, 66 B.R. 454 (Bankr. D. Colo. 1987, *aff'd Bean v. Colorado*, 72 B.R. 503 (D. Colo. 1987). *Bean* does not address the dischargability of a forfeited bail bond, but it addresses the related question of whether execution of a personal appearance bond

posted by a debtor should be stayed by the debtor's bankruptcy filing. In *Bean*, the facts were different from those in this appeal in two crucial respects. First, the surety and the bonded criminal defendant were parent and child. Second, the foreclosure of the debtors' house which served as collateral for the bond was undertaken shortly after the son failed to appear for trial and while he was still at large. In other words, the state sought to foreclose on the debtors' house in order to punish their son's failure to appear for trial, and proceeding with the foreclosure of his parents' home was designed to give him an incentive to turn himself in. Under those circumstances, where the forfeiture of the bond implicated an ongoing police matter, the bankruptcy court held that bankruptcy's automatic stay wold [sic] not operate to prevent forfeiture of the debtors' bond. In Mr. Collins's case, the Commonwealth did not attempt to collect on its judgment until years after the bonds had been forfeited. Moreover, whether or not Mr. Collins suffered a financial loss due to their failure to appear is a matter of indifference to the criminal defendants bonded by him, since their relationship with Mr. Collins was purely financial.

Affirming the bankruptcy court, the district court observed that if all criminal bond sureties were permitted to discharge their debts, then criminal defendants could avoid the sting of forfeitures by having someone other than themselves post bond. *Bean*, 72 B.R. at 505 (cited in *Scott*, 106 B.R. at 700). The Court finds this concern to be highly attenuated in the context of a professional bail bondsmen [sic]. It is true that where the surety and the criminal defendant share a close personal relationship, they may conspire to have the defendant jump bail and

the surety declare bankruptcy in order to avoid the forfeiture of the bond. However, a professional bail bondsman like Mr. Collins is not motivated by familiar affection when he posts a bond for a criminal defendant, but rather is motivated by practical business judgment. The Commonwealth has at its disposal ample means to ensure that professional bondsmen make good on the bonds for which they stand as surety. By statute, Virginia requires professional bondsmen to have adequate collateral, equal in value to the value of the penalty for all bonds from which he has not been released. Va. Code § 19.2-152.1 (Michie 1995). If the Commonwealth still feels insecure, it may require the bondsman to place a deed of trust on the real estate he is using as collateral and name a Commonwealth official as trustee. *Id.* Furthermore, a bondsman cannot even obtain an operating license without depositing with the court $200,000 in collateral. *Id.* With all of these safeguards in place, the Court does not find that the Commonwealth's system of bail requires that the forfeited bonds of professional bondsmen be non-dischargeable.

Finally, the Court does not find that either the Supreme Court's decision in *Kelly* or the Fourth Circuit's decision in *Thompson* dictate a finding of non-dischargability. In *Kelly*, the Supreme Court held that an order of restitution against a criminal defendant was non-dischargeable under § 523(a)(7). Despite the fact that the amount of the restitution ordered was the same as the amount by which the debtor had defrauded the state, the Supreme Court held that the restitution order was penal, not compensatory. In *Thompson*, the Fourth Circuit held that despite the fact that Virginia courts had consistently

termed court costs assessed against convicted criminal defendants as "civil," the court costs were in the nature of a penalty, and thus not dischargeable pursuant to § 523(a)(7). The principle of both *Kelly* and *Thompson* is that a monetary assessment against a convicted criminal defendant is a non-dischargeable "fine, penalty, or forfeiture" under § 523(a)(7), even if it also has compensatory flavor. However, this principle is inapplicable to the instant case because the debtor is not a convicted criminal, but is a professional bail bondsman, whose only relationship to a criminal defendant was a strictly professional one.

II. Whether the Bankruptcy Court abused its discretion in reopening the case.

The Bankruptcy Code authorizes reopening a case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The decision to reopen a case is committed to the sound discretion of the bankruptcy court and depends on the circumstances of each matter. *Hawking v. Landmark Finance Co.*, 727 F.2d 324, 326-27 (4th Cir. 1984). Because we hold that the Commonwealth's $37,130 judgment against Mr. Collins was properly found to be dischargeable, we also hold that the bankruptcy court did not abuse its discretion by reopening the case.

The Clerk is **DIRECTED** to send copies of this opinion and order to counsel of record.

IT IS SO **ORDERED.**

/s/ John A. MacKenzie
United States District Judge

April 2, 1997
Norfolk, Virginia

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

IN RE:	)	
HERBERT & UWANDOLYN COLLINS,	)	Case No. 90-22976
Debtors.	)	

MEMORANDUM OPINION AND ORDER

This matter comes upon the Amended Motion To Reopen by the debtors, Herbert M. and Uwandolyn Collins, moving to have the Court reopen their Chapter 7 case pursuant to 11 U.S.C. § 350. After consideration of the evidence introduced at trial and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Mr. Collins ("Collins") served as a bail bondsman in the City of Norfolk for criminal defendants under the jurisdiction of the Norfolk General District Court Criminal Division.[1] In the late 1980's, the Norfolk General District Court and the Commonwealth of Virginia ("the Commonwealth") obtained numerous judgments against Mr. Collins based on his failure to pay the bonds of criminal defendants for whom he acted as a bondsman

[1] Collins and the Commonwealth have agreed that all the facts necessary for our determination are undisputed and are set forth in their respective memoranda.

and who failed to appear in court on their designated times. Subsequent to the entering of the judgments, Collins filed a Chapter 7 no-asset bankruptcy petition; his discharge was granted shortly thereafter. Included in the list of claims within the petition was an unsecured claim of the Commonwealth against Mr. Collins in the amount of $37,130 for the forfeited bail bonds. In February 1996, the Commonwealth instituted garnishment proceedings in attempt to recover the $37,130 judgment. This is where the contest begins.

Counsel for Collins argues that the garnishment and any attempts to collect are in violation of 11 U.S.C. § 524(a) because the debt was discharged. Consequently, Collins moves to reopen the bankruptcy case in order to determine the dischargeability of the judgment debt owed to the Commonwealth. On the other hand, the Commonwealth takes the position that the debt is non-dischargeable under 11 U.S.C. § 523(a)(7) and any attempts to collect the $37,130 judgment are lawful.

In light of the positions taken by the respective parties, the Court is faced with the following two issues:

1) Is the $37,130 judgment owed by Collins to the Commonwealth dischargeable in bankruptcy?

2) If the Court's [sic] concludes that the judgment is dischargeable, should the bankruptcy case be reopened to permit Collins to include the Commonwealth's judgment?

CONCLUSIONS OF LAW

I. Is the $37,130 judgment owed by Collins to the Commonwealth dischargeable in bankruptcy?

The lynchpin to determining the dischargeability of Collins' forfeited bail bonds is the interpretation of 11 U.S.C. § 523(a)(7) which states that a debt is not dischargeable "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). While it is undisputed that the $37,130 judgment is "for the benefit of a governmental unit," the issue remains as to if the judgment is "for a fine, penalty, or forfeiture" and "not compensation for actual pecuniary loss."

Collins argues that the Commonwealth's claim is "not a fine, penalty or forfeiture" and, therefore, does not fall within the category of nondischargeable debts under § 523(a)(7). In support of its position, Collins cites *In re Midkiff*, 86 B.R. 239 (Bankr. D. Colo. 1988) and *State of N.C. ex. Rel. Long v. Warren*, 37 F.3d 1495 (4th Cir. 1994),[2] as persuasive authority that the debts of bail bondsmen to governmental entities are dischargeable. Furthermore, Collins alleges that any attempts by the Commonwealth

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[2] Although admitting that the Fourth Circuit Court of Appeals in *Warren* expressly declined to decide the instant question, Collins relies on the underlying unpublished decisions of both the United States Bankruptcy and District courts for the Eastern District of North Carolina which held that forfeited bail bonds of a bail bondman [sic] to the state of North Carolina were dischargeable.

to collect the debt violate § 524(a) of the Bankruptcy Code.

The Commonwealth, however, makes two principal arguments that the forfeited bail bond is an obligation that Collins may not discharge in a Chapter 7 bankruptcy proceeding.[3] The Commonwealth's first argument is that the judgment is penal in nature and results from the exercise of "traditional police power." Along these lines, the Commonwealth argues that bail bond forfeitures from which the underlying judgment arises are "not compensation for actual pecuniary loss." In support of its position, the Commonwealth cites *In re Bean*, 66 B.R. 454 (Bankr. D. Colo 1986) and *In re Scott*, 106 B.R. 698 (Bankr. S.D. Ala. 1989), as controlling authority for the premise that a forfeited bail bond obligation to the state is nondischargeable. The Bankruptcy Courts in *In re Scott* and *In re Bean* rationalized that forfeited bail bonds of a surety were nondischargeable because the state bail system's efforts to collect forfeited bail bonds "are not directed at the protection of a pecuniary interest but rather at the exercise of the traditional police power of enforcement of criminal bail proceedings." *In re Scott*, 106 B.R. at 700. Thus, the court concluded that the debtor's obligation is nondischargeable pursuant to the provisions of § 523(a)(7) which excepts dischargeability for a "fine,

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[3] The commonwealth also expresses concern that the § 525(a) could operate to prevent the proper authorities from terminating a bail bondsman's license during the pendency of the bankruptcy. As this issue has not ripened into a contemporaneous matter before the Court, the Court withholds any finding on the § 525(a) issue at the risk of issuing an advisory opinion.

penalty, or forfeiture payable to a governmental unit, and is not compensation for actual pecuniary loss." *Id.* at 701.

The second argument made by the Commonwealth is based on policy considerations. Counsel for the Commonwealth contends in its pleadings that there "would be little incentive for [a] bail bondsman to satisfy his/her obligations to the Commonwealth . . . or Court . . . if he/she can obtain a bankruptcy discharge from forfeiture judgments rendered against him/her" Furthermore, the Commonwealth cites a passage in *In re Bean* which states that "[t]he entire system could be undermined or destroyed if those persons who post appearance bonds may simply discharge their obligation under the protection of the Bankruptcy Court."[4] *In re Bean*, 66 B.R. at 457.

As no court in the Fourth Circuit has decided the issue of whether a forfeited bail bond is dischargeable, the issue of the dischargeability of a forfeited bail bond is a first impression to the Court. Nonetheless, the Court is aware of two cases which, although not specifically square with the issue, shed some light on the question of the dischargeability of a forfeited bail bond. In *Kelly v. Robinson*, 479 U.S. 36 (1986), the Court held that a restitution order entered by a state court as a condition to the

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[4] The court in *In re Scott*, citing *In re Bean*, also stated that the reason that the forfeited bail bond is nondischargeable is because the "purpose of the bail statute would be seriously undermined" if the obligation was dischargeable. *In re Scott*, 106 B.R. at 700. Moreover, there would be a "seriously detrimental" effect on the "enforcement of bail laws" because criminal defendants would be able to avoid the harsh ramifications of the bail bond forfeiture by taking advantage of the Bankruptcy Code. *Id.*

criminal defendant's probation was nondischargeable under § 523(a)(7). The Court stated that "we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence." *Id.* at 50. However, while *Kelly* involved a restitution debt incurred as a condition to a criminal sentence, the facts and circumstances of the Commonwealth's claim against Collins involve an obligation incurred as a condition to bail. Therefore, without concluding as to the obvious intrinsic difference between a criminal sentence and a condition for release on bail, we believe that the question of the dischargeability of a forfeited bail bond is not answered by the holding in *Kelly*.

In *In re Thompson*, 16 F.3d 576, 581 (1994), the Fourth Circuit Court of Appeals held that unpaid court costs arising from a debtor's state criminal conviction were not dischargeable under § 523(a)(7). The court in *Thompson* cited *Kelly v. Robinson* for the proposition that these court costs, which were imposed as the result of a criminal conviction, are nondischargeable in bankruptcy. *Id.* at 580. However, the Court is also reticent to rely on *In re Thompson* because the issue before the Court of Appeals dealt with court costs imposed as a part of the criminal sentence. Here, not only had there not been a criminal sentence imposed, but the debtor (Collins) is not the party who faced criminal charges before the state court.

Because the Court has no precedential authority from any court within the Fourth Circuit upon which to base its determination, it is forced to apply its own analysis to determine the dischargeability of the forfeited bail bonds. Consequently, the Court relies upon the following four premises to help it reach its holding.

Although no bankruptcy court in the Fourth Circuit has determined the dischargeability of a debt owed by a debtor as surety on forfeited bail bonds, a bankruptcy court in the Third Circuit has opined on the issue. The court in *In re Damore*, 195 B.R. 40, 42 (Bankr. E.D. Pa. 1996), held that a forfeited bail bond obligation was dischargeable in bankruptcy. The key to Judge Twardoski's analysis was that, because the debtor was not the defendant who failed to appear in the underlying state court criminal proceedings, the bail bond obligation was not subject to the fine or forfeiture exception to discharge under § 523(a)(7). *Id.* The facts surrounding *In re Damore* are remarkably similar to the facts of the case at hand.[5] In *In re Damore*, the debtor, a professional bail bondsman, signed two bail bonds as a surety for defendants in the Criminal Division of the Court of Common Pleas of Berks County (Pa.). *Id.* at 41. Because the criminal defendants failed to appear, the bonds became forfeited and the Berks County Court won judgments against the debtor for the bond amount. *Id.* Subsequent to the judgments being entered against him, the debtor filed his Chapter 7 petition. *Id.* Although the Court does not consider in *In re Damore* to be dispositive, the Court believes that the analysis with particular emphasis on the distinction

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[5] Unlike the case at hand, however, the moving party in *In re Damore* was the municipality, which sought a determination of the dischargeability of the debt under § 523(a)(7). *In re Damore*, 195 B.R. 40, 41 (Bankr. E.D. Pa. 1960). Here, it is the debtor, Collins, who is seeking the answer to the dischargeability question. The Court does not believe that this minor difference in the facts causes the Court to deviate from the analysis in *In re Damore*.

between a debtor who is the actual criminal defendant in the criminal proceedings and the debtor who is the surety or bail bondsman is integral to the dischargeability determination.

The second pillar supporting the Court's decision is that, in Virginia, the law appears clear as to the nature of the cause of the action in the collection of a forfeited bail bond. While the creation of the recognizance or bail bond may stem from a matter criminal in nature, "the execution of the bond and the effort of the Commonwealth to collect a debt due by reason of the forfeiture of the recognizance [bond] is a matter purely civil." *Collins v. Commonwealth*, 134 S.E. 688, 689 (Va. 1926). "Civil" is defined by Black's Law Dictionary as "[r]elating to private rights and remedies sought by civil actions as contrasted with a criminal proceeding;" civil "actions" are causes of actions "other than criminal proceedings." *Black's Law Dictionary* 222 (5th ed. 1979). This leads to an obvious syllogism. As earlier highlighted, the court in *Collins* held that the forfeiture of a bail bond is a civil proceeding. "The distinction between a civil and a criminal proceeding, taken in the most ancient and approved authorities, is not whether the state is a party . . . but whether the real end or object of the proceeding is punishment or reparation." *Jernigan v. Commonwealth*, 52 S.E. 361, 362 (1905) (the court concluded that the proceeding was criminal in nature because the warrant underlying the cause of action "was not intended in any way to make reparation for the private injury").[6] A reparation is

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[6] A civil action is one which is brought "by an ordinary proceeding in a court of justice, by which a party prosecutes

defined in Black's Law Dictionary as a "payment for an injury." *Black's Law Dictionary* 1167 (5th ed. 1979). As the forfeited bail bond is a civil action which involves a reparation or payment for an injury, the logical conclusion which completes the syllogism is that the forfeited bail bond is not a "fine, penalty, or forfeiture" nor, more importantly, is it "not compensation for actual pecuniary loss."

The third premise influencing the Court is that the bail bond relationship is a surety relationship. In Virginia, a surety is defined as one who is an insurer of a debt of the principal. *Piedmont Guano & Mfg. v. Morris*, 86 Va. 941 (1890). In *Courson v. Simpson*, 468 S.E.2d 17 (Va. 1996), the Virginia Supreme Court stated that a surety relationship is based upon two contractual obligations of the parties. *Id.* at 20. The first contractual obligation is the debt between the principal debtor and the creditor. *Id.* The second obligation, which secures the principal debt, is between the surety and the creditor. *Id.* Because Collins is insuring that the defendant's debt will be paid to the Commonwealth and the City of Norfolk in the event that he fails to appear, a surety relationship has been created with the criminal defendant as the debtor, the Commonwealth and City of Norfolk as the creditor, and Collins as the surety. "The measure of damages recoverable [in a contract cause of action] is the *actual loss or damage* [emphasis added] sustained on account of the breach." *Paddock v. Mason*, 48 S.E.2d 199, 203 (Va. 1948). Therefore,

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another party for the enforcement or protection of a right or for the redress or prevention of a wrong." *Gilken v. Gilken*, 104 S.E.2d 861, 863 (N.C. 1958).

the next logical step is to determine that the proper remedy on a forfeited bail bond is the recovery of the "actual loss." As § 523(a)(7) states that a debt is not dischargeable to the extent that it is "not for actual pecuniary loss," the axiomatic conclusion is that the forfeited bail bond does not fall within the scope of § 523(a)(7).

Finally, while the Court understands and appreciates the policy concerns expressed by the Alabama and Colorado Bankruptcy Courts and reiterated by the Commonwealth, the Court is reluctant to treat the policy arguments as persuasive. The Commonwealth raises potentially valid consequences if the Court finds that forfeited bail bond obligations are dischargeable in bankruptcy. However, the Court believes that it is not merely judicial conjecture that there are extensive regulations and checks and balances in place to ensure that the bail bond system will not be eviscerated as a result of actions taken by the Bankruptcy Court. In short, the Court believes that the laws and procedural safeguards in Virginia with respect to the bail system outweigh the policy concerns. The Commonwealth is ostensibly protected form the forfeiture of bail bonds by having such bonds secured by real estate. Virginia Code section 19.2-152.1 states that "[n]o professional bondsman shall enter into [a bail] bond if the aggregate of the penalty of such bonds and all other bonds, on which he has not been released from liability, is in excess of the true market value of his real estate." Furthermore, § 19.2-152.1 illustrates some additional bail system safeguards and incentives to the bail bondsmen to not default on their obligations by stating that:

> Any professional bondsman or agent for any professional bondsman, qualified under this section, shall be subject to and governed by any reasonable rules of conduct or procedure set up by the judge of the court in which he is acting as a bondsman . . . Upon his violation of such rules, he may after hearing upon a charge of such violation, be suspended form [sic] entering into further bonds in said court by the judge thereof . . . If such bondsman or agent fails to have in escrow with the clerk of said court a sum sufficient to cover any forfeiture of bond against him and fails or refuses to pay such forfeiture after notice and demand by the judge of the court he may be suspended by such judge form [sic] entering into further bonds in said court until the forfeiture is paid or it is adjudicated that he is not liable thereon.
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> *Va. Code Ann. § 19.2-152.1 (Michie 1996).*

The Commonwealth's claim that the [sic] there will be a "continuing harm to the Commonwealth and a threat to the public safety" if the debt is discharged is likely overstated given the existing regulatory authorization as evidenced by § 19.2-152.1. While there is the possibility that some bail bondsmen may take advantage of the Bankruptcy Code, such nefariousness is possible with respect to any business debt or obligation incurred by any entity in any type of transaction. Moreover, as evidenced by § 19.2-152.1, it appears that it is the Commonwealth, not the Bankruptcy Court, which will maintain the integrity of the bail bond system by ensuring that bail bonds are properly collateralized by real estate or sufficient escrow funds. In summary, the Court believes that there are sufficient safeguards in place to ensure that the

bail bond system in Virginia continues to function properly notwithstanding the precedence that a judgment arising from a bail bondsman's forfeited bail bond is ultimately dischargeable in bankruptcy.

Therefore, in light of the foregoing reasons, we hold that a judgment against a surety or bail bondsman arising from a forfeited bail bond does not fall under the provisions of § 523(a)(7) and, therefore, is dischargeable in a bankruptcy proceeding. As the Court limits its holding to the forfeited bail bond for which the surety remains liable, we do not expressly opine as to the issue presented in the scenario where it is the criminal defendant himself who has forfeited the bail bond and subsequently filed for bankruptcy protection.

II. If the Court concludes that he judgment is dischargeable, should the bankruptcy case be reopened to permit Collins to include the Commonwealth's judgment?

Section 350(b) of the Bankruptcy Code provides that "[a] case may be reopened . . . to administer assets, to accord relief to the debtor, or for other cause." *11 U.S.C. § 350(b).* The decision to reopen a bankruptcy case is committed to the sound discretion of the Court and depends upon the circumstances of each matter. *Id.* (citing *Hawkins v. Landmark Finance Co.*, 727 F.2d 324, 326 (4th Cir. 1984) and *Thompson v. Virginia (In re Thompson)* 16 F.3d 576, 581-82 (4th Cir. 1994), *cert. denied*, 114 S. Ct. 2709 (1994)). The most important factor in deciding whether to reopen the case is if there is any potential prejudice to the creditor. *Id.* (citing *Hawkins*, 727 F.2d at 326 and *Thompson*,

16 F.3d at 580). However, a case should not be reopened where reopening would be futile and a waste of judicial resources. *Id.* (citing *In re The Yoder Co.*, 158 B.R. 99, 100 (Bankr. N.D. Ohio 1993) and *In re Carberry*, 186 B.R. 401, 403 (Bankr. E.D. Va. 1995)). As the Court has determined that the forfeited bail bond obligation is dischargeable, there is no prejudice nor would there be a waste of judicial resources if the bankruptcy case is reopened. Therefore, in light of the Court's conclusion that Collins' judgment debt is dischargeable, the Court grants the debtor's Motion to Reopen.

CONCLUSION

Based on the foregoing, the Court holds that the Commonwealth's $37,130 judgment against Collins for the forfeited bail bonds is DISCHARGEABLE. Consequently, the debtor's Motion To Reopen is GRANTED.

The Clerk is directed to forward copies of this Memorandum Opinion and Order to Karen M. Crowley, Esquire, counsel for the debtor and to Melvin R. Zimm, Esquire, counsel for the Commonwealth of Virginia and the City of Norfolk.

IT IS SO ORDERED this 8th day of November 1996.

/s/ Stephen C. St. John
THE HONORABLE
STEPHEN C. ST. JOHN
United States Bankruptcy
Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 2, 1999

No. 97-1580
CA-96-1195-2
BK-90-22976-S

In re: HERBERT M. COLLINS; In Re: UWANDOLYN BLACKWELL COLLINS

Debtors

COMMONWEALTH OF VIRGINIA; COMMONWEALTH OF VIRGINIA, ex rel City of Norfolk; COMMONWEALTH OF VIRGINIA, ex rel Norfolk General District Court

Plaintiffs - Appellants

v.

HERBERT M. COLLINS; UWANDOLYN BLACKWELL COLLINS;

Defendants - Appellees

UNITED STATES OF AMERICA

Intervenor

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 8, 1998

No. 97-1580
CA-96-1195-2
BK-90-22976-S

In re: HERBERT M. COLLINS; UWANDOLYN BLACKWELL COLLINS

Debtors

COMMONWEALTH OF VIRGINIA; COMMONWEALTH OF VIRGINIA, ex rel City of Norfolk; COMMONWEALTH OF VIRGINIA, ex rel Norfolk General District Court

Plaintiffs - Appellants

v.

HERBERT M. COLLINS; UWANDOLYN BLACKWELL COLLINS;

Defendants - Appellees

ORDER

Appellants have filed a motion to dismiss for lack of jurisdiction and the appellees have filed a response in opposition.

The Court denies appellants' motion without prejudice.

FOR THE COURT

/s/ Patricia S. Connor
CLERK

[p. 1] IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE:	)	Chapter 7
HERBERT M. and	)	
UWANDOLYN B. COLLINS	)	90-22976

EXCERPT FROM
TRANSCRIPT OF PROCEEDINGS
Norfolk, Virginia
September 17, 1996

Before:

THE HONORABLE STEPHEN C. ST. JOHN, Judge

Appearances:

MARCUS, SANTORO, KOZAK & MELVIN
By: KAREN M. CROWLEY, ESQ.
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Counsel for the Debtors

GLASSER AND GLASSER
By: MELVIN R. ZIMM, ESQ.
600 Dominion Tower
999 Waterside Drive
Norfolk, Virginia 23510
(757) 640-9397
Counsel for the Commonwealth of Virginia

Also Present:

KRISTI R. WEAVER, RPR
6330 Newtown Road
Norfolk, Virginia 23502

(Proceedings recorded by mechanical stenography, transcript produced by computer.)

[p. 2] THE CLERK: Herbert and Uwandolyn Collins.

THE COURT: Good morning, Ms. Crowley.

MS. CROWLEY: Good morning, Your Honor. I'm Karen Crowley and I represent Herbert and Uwandolyn Collins, and this is our motion to reopen the Chapter 7 bankruptcy case where the Collinses received a discharge in 1990 in order to determine the dischargeability of a debt.

As you know, the Commonwealth – I'm going to collectively refer to the Commonwealth of Virginia and the City of Norfolk just as the Commonwealth. They filed an objection stating there's no basis to reopen this matter because as a matter of law the debt is nondischargeable. I agree that the cases do say that if the Court would find the matter is not dischargeable, then there is no need to reopen it. And, therefore, my arguments are more toward the dischargeability issue than to the reopening issue.

THE COURT: Let me ask you this, Ms. Crowley, because I've had a – this is now the third motion to reopen I've had in about a month, and given my lack of experience with them I want to ask you this to start, because it concerns me. I understand the case law in effect that seems to suggest as you've just mentioned.

Apparently Mr. Zimm advocates that if I can look to the – sort of the underlying case issue, if you

* * *

[p. 43] MR. ZIMM: Just to respond. Again, the code section to which I cite is 19.2-149, and it looks pretty clear to me that there is no 12-month limitation on the discharge of the surety on the bond forfeiture obligation. No time limitation whatsoever.

The other point I would make is I believe that the procedural posture would be such that if the motion to reopen would be granted, an adversary proceeding would have to be filed. The complaint would have to be served in accordance with the bankruptcy rules.

And one thing I mention to the Court in that respect is we made – our firm made a special appearance on behalf of the Commonwealth on this particular matter because we happen to be – for this hearing only because we were, in fact, representing the Commonwealth in the collection of these judgments. However, I believe that once an adversary proceeding is initiated, if it were to be initiated, and we hope it would not be allowed to be done, but if that were the case that it would have to be served like any other adversary complaint upon the Commonwealth in accordance with the bankruptcy rules, follow the same procedures of response, be set for trial, pretrial conference, and the whole ball of wax.

And whether or not the Court's ruling on the non-dischargeability issue in this posture would be res [p. 44] judicata would be hard to say, because, obviously, if the Court allows this matter to be reopened, I don't know

that the Court has to rule by virtue of that that the debt is dischargeable.

THE COURT: All right, sir. Thank you. The Court appreciates the arguments. Obviously, again, the memorandum filed were most helpful. Certainly your arguments have been excellent. As much as I have enjoyed this case so far, I do wish the Fourth Circuit in Warren had chosen to decide that, because this is, obviously, a tough issue. I'm going to have to, unfortunately, take this under advisement, and I will try and get back to you-all very promptly. Again, thank you very much for your excellent arguments.

MR. ZIMM: Thank you, Your Honor.

MS. CROWLEY: Thank you.

(The proceedings were concluded at 11:55 a.m.)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

In Re:

HERBERT MARTEL COLLINS,
UWANDOLYN BLACKWELL COLLINS,

Debtors.

Chapter 7

Case No: 90-22976-B

OBJECTION TO DEBTORS' AMENDED MOTION TO REOPEN

NOW COMES the Commonwealth of Virginia, Commonwealth of Virginia ex rel. City of Norfolk and the Commonwealth of Virginia ex rel. Norfolk General District Court, creditors of the Debtors herein, by counsel, which counsel is making a special appearance in this matter on behalf of said creditors for the sole purpose of objecting to the Debtors' Amended Motion to Reopen filed herein ("Debtors' Motion") and as and for the objection of said creditors to the Debtors' Motion state as follows:

1. That these creditors admit the allegations set forth in paragraphs 1 through 7 of the Debtors' Motion (including both sets of paragraphs erroneously numbered 4 and 5).

2. That these creditors deny the allegations set forth in paragraph 8 of the Debtors' Motion with regard to any contention on the part of the Debtors that the indebtednesses due these creditors are dischargeable under any provision of the Bankruptcy Code. These creditors admit

that they rely on the case of *In re Scott* cited in paragraph 8 of the Debtors' Motion and other case law authority which is more specifically set forth in a separate memorandum in support of this objection which is attached hereto and incorporated by reference. These creditors deny that the cases cited by the Debtors in support of their position that the aforementioned indebtednesses are dischargeable under 11 U.S.C. Section 523(a)(7) are more persuasive authority than the cases cited by these creditors. These creditors further contend that in the case of *State of N.C. ex rel. Long v. Warren*, cited by the Debtors as authority to support their argument regarding the dischargeability of the indebtednesses due these creditors, the United States Court of Appeals for the Fourth Circuit specifically *vacated* the holdings of the United States District Court for the Eastern District of North Carolina and United States Bankruptcy Court for the Eastern District of Virginia, Wilson Division, on this issue in order to assure that said holdings could not be used as case law precedent in any jurisdiction. Accordingly, these creditors affirmatively allege that this opinion of the United States Court of Appeals for the Fourth Circuit and the opinions of the North Carolina District Court and Bankruptcy Court on this issue cannot and should not be used as support for the Debtors' Motion.

3. That these creditors admit the allegations set forth in paragraph 9 of the Debtors' Motion to the extent that no complaint to determine dischargeability relative to the indebtednesses due these creditors was filed during the pendency of the Debtors' Chapter 7 case. These creditors deny the remaining allegations set forth in paragraph 9 of the Debtors' Motion and affirmatively allege

that, pursuant to the provisions of 11 U.S.C. Section 523(c), no time is fixed under bankruptcy law for the filing of dischargeability complaints for debts arising under 11 U.S.C. Section 523(a)(7) and, pursuant to the provisions of said Bankruptcy Code section, such debts are presumed to be nondischargeable.

4. That these creditors deny the allegations set forth in paragraphs 10 and 11 of the Debtors' Motion. These creditors affirmatively allege that any attempt on the part of the Debtors to reopen this case to determine the dischargeability of the indebtedness due these creditors is unnecessary because such debts are clearly non dischargeable pursuant to 11 U.S.C. Section 523(a)(7) and that the reopening of this case to file a complaint to determine dischargeability would be futile and impose unnecessary expense upon these creditors in defending such complaint. *See, In re Thompson*, 16 F.3d 576 (4th Cir. 1994).

5. That the allegations set forth in paragraph 12 of the Debtors' Motion require no response other than the filing of this objection which is filed within the time period specified in said paragraph.

WHEREFORE, the Commonwealth of Virginia, Commonwealth of Virginia ex rel. City of Norfolk and the Commonwealth of Virginia ex rel. Norfolk General District Court, by counsel, which counsel is making a special appearance in this matter on behalf of said creditors for the sole purpose of objecting to the Debtors' Amended Motion to Reopen filed herein, move that the Debtors' Amended Motion to Reopen filed herein be denied and

that they be awarded their attorney's fees and costs herein incurred.

COMMONWEALTH OF VIRGINIA,
COMMONWEALTH OF VIRGINIA EX REL. CITY OF NORFOLK, COMMONWEALTH OF VIRGINIA EX REL. NORFOLK GENERAL DISTRICT COURT

By /s/ Melvin R. Zimm
Of Counsel

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

In re:

HERBERT MARTEL COLLINS
SSN 225-60-6689
UWANDOLYN BLACKWELL
COLLINS
SSN 229-82-6205

Debtors.

Chapter 7
Case No.
9-22976-B

AMENDED
MOTION TO REOPEN

COMES NOW Herbert Martel Collins and Uwandolyn Blackwell Collins ("Debtors"), by counsel, and move the Court to reopen their Chapter 7 case pursuant to 11 U.S.C. § 350, stating as follows:

1. Mr. Collins, during the 1980's, served as a bail bondsmen in the City of Norfolk for defendants in the Norfolk General District Court Criminal Division ("Norfolk Court").

2. During the late 80's, the Norfolk Court obtained numerous judgments against Mr. Collins based on his failure to pay the bonds of criminal defendants for whom he acted as a bondsman and who did not appear in court.

3. On June 20, 1990, the Debtors filed a Chapter 7 petition in Bankruptcy under title 11 of the United States Code. An order for relief was entered at that time.

4. Included in the petition was the unsecured claim of the Norfolk Court against Herbert Collins for judgments in the amount of $37,130, identified on Schedule A-3 as a claim based on "bail bonds".

5. The Norfolk Court had actual notice of the Collins' bankruptcy filing and the inclusion of the bail bonds as an unsecured debt of Mr. Collins.

6. The Debtors' Chapter 7 was a no asset case.

4. On October 11, 1990 on Order was entered discharging the Debtors of all dischargeable debts.

5. On October 30, 1990, by Order of this Court, H. Lee Addison, III was discharged as Trustee of the estate and the case was closed.

7. On February 27, 1996, the Norfolk Court instituted garnishment proceedings to garnish the wages of Mr. Collins for payment its pre-petition judgments. On or about July 2, 1996, the Norfolk Court filed a Summons to Answer Interrogatories and Subpoena Duces Tecum in its attempts to collect the pre-bankruptcy claims from Mr. Collins.

8. The claim of the Norfolk Court was discharged in Bankruptcy and its attempts to collect the claim are in violation of 11 U.S.C. § 524(a) of the Bankruptcy Code. Counsel for the Norfolk Court disagrees with this conclusions [sic] and believes that the debt is non-dischargeable under 11 U.S.C. § 523(a)(7) and cites *In re Scott*, 106 B.R. 698 (Bankr.S.D.Ala. 1989) in support of its position. However, the defendant believes that more persuasive authority exists that the debts of bail bondsmen to governmental entities are dischargeable and do not fit under

the nondischargeability provision of 11 U.S.C. § 523(a)(7). *See, In re Midkiff*, 86 B.R. 239 (Bankr.D.Colo. 1988) (Court ruled that debt of bail bondsman was dischargeable.) *See also, State of N.C. ex rel. Long v. Warren*, 37 F.3d 1495 (4th Cir. 1994) (Unpublished disposition which reflects that one district court has ruled that the debts of bail bondsman to governmental entities are dischargeable despite § 523(a)(7)).

9. No complaint to determine dischargeability or objecting to the discharge of the Debtors was filed within the time fixed by the Court.

10. The Debtors desire to reopen this case in order to determine the dischargeability of the debt to the Norfolk Court. 11 U.S.C. § 350(b) allows a case to be "reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

11. No creditor or party in interest will be prejudiced by allowing the Debtors to reopen their case in order to file a complaint to determine the dischargeability of the debt to the Norfolk Court.

12. Any objections to the reopening of this case must be filed within five (5) business days prior to the hearing.

WHEREFORE, the Debtors pray that the Court enter an Order authorizing them to reopen their case, and for such other relief as is appropriate.

HERBERT MARTEL COLLINS
UWANDOLYN BLACKWELL COLLINS

BY /s/ Frank J. Santoro
Of Counsel

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IN RE: CHAPTER 07
CASE NUMBER: 90-22976-B
HERBERT MARTEL COLLINS
UWANDOLYN BLACKWELL COLLINS
2737 CHESAPEAKE BLVD.
NORFOLK, VA 23509-1737

SSN-ID:
225-60-6689
229-82-6205

U. S. BANKRUPTCY COURT
WALTER E. HOFFMAN
US COURTHOUSE
600 GRANBY STREET,
ROOM 480
NORFOLK, VA 23510-1915

*** DISCHARGE OF DEBTOR ***

IT APPEARING THAT A PETITION WAS FILED ON 6/20/90 BY THE ABOVE-NAMED DEBTOR COMMENCING A CASE UNDER TITLE 11, UNITED STATES CODE, AND AN ORDER FOR RELIEF WAS ENTERED UNDER CHAPTER 7 AND THAT NO COMPLAINT OBJECTING TO THE DISCHARGE OF THE DEBTOR WAS FILED WITHIN THE TIME FIXED BY THE COURT (OR THAT A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR WAS FILED AND, AFTER DUE NOTICE AND HEARING, WAS NOT SUSTAINED),

IT IS ORDERED THAT

1. THE ABOVE-NAMED DEBTOR IS RELEASED FROM ALL DISCHARGEABLE DEBTS.

2. ANY JUDGMENT HERETOFORE OR HEREAFTER OBTAINED IN ANY COURT OTHER THAN THIS COURT IS NULL AND VOID AS A DETERMINATION OF THE PERSONAL LIABILITY OF THE DEBTOR WITH RESPECT TO ANY OF THE FOLLOWING:

   (A) DEBTS DISCHARGEABLE UNDER 11 U.S.C. 523,

   (B) UNLESS HERETOFORE OR HEREAFTER DETERMINED BY ORDER OF THIS COURT TO BE NONDISCHARGEABLE, DEBTS ALLEGED TO BE EXCEPTED FROM DISCHARGE UNDER CLAUSES (2), (4) AND (6) OF 11 U.S.C. 523(A).

   (C) DEBTS DETERMINED BY THIS COURT TO BE DISCHARGED UNDER 11 U.S.C. 523(D).

3. ALL CREDITORS WHOSE DEBTS ARE DISCHARGED BY THIS ORDER AND ALL CREDITORS WHOSE JUDGMENTS ARE DECLARED NULL AND VOID BY PARAGRAPH 2 ABOVE ARE ENJOINED FROM COMMENCING, CONTINUING OR EMPLOYING ANY ACTION, PROCESS OR ACT TO COLLECT, RECOVER OR OFFSET ANY SUCH DEBT AS A PERSONAL LIABILITY OF THE DEBTOR, OR FROM PROPERTY OF THE DEBTOR, WHETHER OR NOT DISCHARGE OF SUCH DEBT IS WAIVED.

NOTICE TO DEBTOR OF RIGHTS UNDER 11 U.S.C. 524(D):

YOU ARE UNDER NO OBLIGATION TO REAFFIRM A DEBT. YOU MAY CANCEL ANY REAFFIRMATION AGREEMENT WITHIN 60 DAYS OF THE EFFECTIVE DATE. AS TO THE EFFECTIVE DATE OF ANY SUCH AGREEMENT, CONSULT YOUR ATTORNEY. THE COURT MAY SUBSEQUENTLY DISAPPROVE ANY REAFFIRMATION AGREEMENT PURSUANT TO THE STANDARD OF 11 U.S.C. 524(C).

DATED OCTOBER 11, 1990 AT NORFOLK, VA
FOR THE COURT
ROBERT M. WILY, CLERK

Supreme Court, U.S.
FILED
SEP 29 1999
OFFICE OF THE CLERK

No. 99-380

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, et al.,
Petitioner,

v.

HERBERT MARTELL COLLINS AND
UWANDOLYN BLACKWELL COLLINS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of the Amici States in Support of Virginia

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STEPHEN R. MCALLISTER
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(Additional Counsel Listed after Conclusion)

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INTERESTS OF THE AMICI CURIAE

The 34 Amici States have a significant interest in the interpretation of the Eleventh Amendment and its application to bankruptcy proceedings. As a practical matter, the States are creditors in hundred of thousands of bankruptcy cases each year with respect to debtor obligations such as taxes, fines, student loans and domestic support obligations. The Amici States therefore are seriously and adversely affected by lower courts' efforts to end run the States' Eleventh Amendment immunity in bankruptcy cases.

The Fourth Circuit's decision in this case gives debtors complete control to force litigation of contested discharge issues involving the States into possibly distant bankruptcy courts, even in no-asset cases where the States have not filed a claim. Moreover, The Fourth Circuit's decision ignores this Court's prior decisions regarding the Eleventh Amendment in cases based on *in rem* jurisdiction. In so doing, the Fourth Circuit's approach in this case could eliminate the States' Eleventh Amendment immunity in any case involving property under a federal court's jurisdiction. That unwarranted result could extend far beyond the bankruptcy context because there are many instances in which a federal court's jurisdiction is based, at least in part, on the court's control over a particular *res*.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION WILL HAVE A TREMENDOUS IMPACT ON THE STATES IN BANKRUPTCY CASES

This Court's recent state immunity cases emphasize that the Eleventh Amendment represents an essential constitutional principle that the lower federal courts must respect and enforce. Some lower courts, however, including many bankruptcy courts, have actively sought opportunities and methods to circumvent or otherwise obviate the States' constitutional immunity. *In re Collins*, Pet. App. 1-20a, is a notable example.

1. The importance to the States of bankruptcy courts properly respecting the States' sovereign immunity is demon-

strated by the sheer volume of bankruptcy proceedings and the States' roles in them. In the year ending June 30, 1999, according to statistics kept by the Administrative Office of the United States Courts, almost 1.4 million bankruptcy cases were filed. Of that total, 97 percent (or 1,352,030 petitions) were filed by individuals, to whom the discharge and the exceptions to discharge provisions of Section 523 of Title 11 of the United States Code apply. Of that 1.35 million cases, Chapter 7 liquidation cases comprised 71.65 percent, and of that number, some 95% were so-called "no-asset cases," *i.e.*, there were no non-exempt assets in the estate available for distribution to creditors.[1] In such "no asset cases," creditors are routinely informed by the bankruptcy court *not* to file any claims. In the vast majority of such cases, there are no proceedings that would require direct involvement of creditors before the trustee prepares his report to the court. Once the trustee files the report, if no timely objections to the discharge are filed, the "court shall forthwith grant the discharge."[2]

Thus, in the last fiscal year, there were some 920,000 bankruptcy cases in which the States could potentially have been creditors holding debts that would be excepted from discharge, but in which the States would *not* have filed claims,

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[1] The statistics on case filings are taken from the website of the Administrative Office of the United States Courts, http://www.uscourts.gov/news.html, and are contained in a press release entitled "In June, Total Bankruptcies Filed Decline Again, Personal Bankruptcies Fall for First Time in 5 Years" and dated August 6, 1999. The statistics on "no-asset" filings are contained in the *Report of the National Bankruptcy Review Commission, Vol. 1*, p. 137, based on a study by the General Accounting Office of case filings in 1992. As the Review Commission noted, that 5% figure also includes asset filings by non-individuals, in whose cases some 80% of the total bankruptcy receipts were recorded. Thus, the number of cases filed by individuals with significant assets against which claims may be filed is vanishingly small.

[2] *See generally* Federal Rules of Bankruptcy Procedure (hereinafter FRBR) 4004.

and in which the States would not have had any reason to make an appearance or to otherwise be deemed to have voluntarily invoked the jurisdiction of the federal courts. This would normally suggest that the States' Eleventh Amendment immunity would preclude the federal courts from entering any order against them. But *Collins* end runs all of this.

Under *Collins*, the States could face undesired discharge litigation in literally hundreds of thousands of cases. Indeed, the frequency with which States must appear to defend their rights in bankruptcy proceedings is increasing as bankruptcy courts are permitting plans and schedules to include provisions contrary to the Code and binding States to them under *res judicata* theories. *See, e.g. In re Andersen*, 179 F.3d 1253 (10th Cir. 1999) (creditor cannot sit on its rights and expect bankruptcy court or trustee to protect its interests; in absence of timely objection, court enforced plan provision that discharged student loan on the basis of hardship even though there had been no litigation or proof on that issue); *In re Pardee*, 218 B.R. 916, 922 (B.A.P. 9th Cir. 1998), *aff'd in unpublished opinion*, No. 98-15942, 1999 WL 462339 (9th Cir. July 7, 1999) (when chapter 13 plan contains a provision that is contrary to the Code, student loan creditor must object to the plan or appeal confirmation order; failure to do so bars creditor from collaterally attacking the plan after confirmation).

2. Moreover, because of the nationwide jurisdiction of the bankruptcy courts, this undesired litigation may take place in forums in which there is no factual or legal basis for asserting jurisdiction over the State except for the circumstance that the debtor has chosen to move to that locale.[3] Each court is

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[3] FRBP 7004(d) provides for national service of process and allows the debtor to force any litigation into the location of the bankruptcy filing, so long as the creditor has the required "minimum contacts" with the United States, regardless of the lack of contacts with the forum jurisdiction. *E.g. In re Federal Fountain, Inc.*, 165 F.3d 600, 601-602 (8th Cir. 1999); *In re TJN, Inc.*, 207 B.R. 502, 506 (Bankr. D. S.C. 1996); *In re Allegheny Inc.*, 68 B.R. 183, 187 (Bankr. W.D. Pa. 1986).

allowed to determine its own rules for permitting out-of-state counsel to appear and for requiring local counsel as well. There are close to a hundred separate bankruptcy districts—and an equal number of sets of local rules and requirements. Unlike the Rules applicable to Multidistrict Litigation which automatically allow all parties to retain their existing counsel and appear in the case without further effort,[4] it is often necessary for a State to prepare motions for admission, pay a fee, and retain additional counsel, all before the State can even defend itself in a proceeding that the State has no desire to have heard in federal court to begin with. As a result, when a particular debt is relatively small, the costs to the States of pursuing such issues in a distant bankruptcy forum will often be impractical. Thus, debtors may—by the simple expedient of instituting the litigation in a distant forum—be able to obtain a discharge for which the Code does not provide.

Examining several specific examples puts the problem in full perspective. The vast majority of taxes, for instance, are nondischargeable. Since virtually all debtors are taxpayers, there is a potential for tax discharge issues in almost every proceeding. By the same token, many debtors have student loans outstanding when they file bankruptcy, obligations that are nondischargeable unless and until the debtor obtains a determination that repaying the debt would be an undue hardship. *See* Higher Education Amendments of 1998, Pub.L. No. 105-244, § 971, 112 Stat. 1581, 1837 (1998); S.Rep. No. 95-989, at 79 (1978); *e.g., In re Johnson*, 218 B.R. 449 (B.A.P. 8th Cir. 1998); *In re Stout*, 231 B.R. 313, 315-316

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[4] Rule 1.4 of the Federal Rules for Multidistrict Litigation provides: "Every member in good standing of the Bar of any district court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. Any attorney of record . . . may continue to represent his or her client in any district court of the United States to which such action is transferred. Parties to any action transferred under Section 1407 are not required to obtain local counsel in the district to which such action is transferred."

(Bankr. W.D. Mo. 1999), *Buford v. Higher Education Assistance Foundation*, 85 B.R. 579, 582 (D. Kan. 1988). States are involved in collecting those loans in a great many cases and face the potential for being forced into a bankruptcy court wherever the debtor chooses to live after graduation.

As a third example, numerous debtors owe nondischargeable domestic support obligations to their children and former spouses. The States are often deeply involved in collecting those debts, either for the spouse and children, or for the States' own accounts, when the States have already provided financial support to those beneficiaries. Again, the noncustodial spouse has often moved far from the locale where his or her children and former spouse reside, perhaps specifically to avoid payment of those obligations.

In each of these situations, there is no reason either logically or under the law that a discharge determination must be made in federal court. *See* 28 U.S.C. § 1334(b) (granting federal courts original, but not exclusive, jurisdiction over matters "arising under title 11, or arising in or related to cases under title 11", which includes discharge determinations). Section 523(a) of the Bankruptcy Code (11 U.S.C. § 523(a)) defines eighteen grounds for excepting debts from discharge—but only four of those *must* be litigated in bankruptcy court.[5] All other exceptions are self-executing, and state and federal courts have concurrent jurisdiction to apply those exceptions. Moreover, the fact that certain debts owed to the States are not dischargeable demonstrates the significance Congress attached to those debts being collected. Collection will often be difficult or effectively impossible when the debtor alone controls the choice of forum for resolving disputes.

3. The impact of the *Collins* decision is all the more serious because Eleventh Amendment immunity is not just an immunity from substantive liability, but rather an immunity from being

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[5] Sections 523(a)(2), (4), (6), and (15). *See* Section 523(c)(1).

haled into federal court at all. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf and Eddy Inc.*, 506 U.S. 139 (1993). Put another way, although federal bankruptcy *law* is supreme, the federal *courts* do not necessarily possess the authority to enforce that law against an unconsenting State. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *In re NVR, LP*, No. 98-2211, 1999 WL 486614, at *9 (4th Cir. July 12, 1999).

The effect of the Fourth Circuit's decision would be to allow debtors, by the simple expedient of including a request to determine the dischargeability of a debt in a motion to reopen a no-asset Chapter 7 case (or some other motion the debtor may choose to file), to force the States to contest such matters in a bankruptcy court at a time and in a location of the debtor's choosing. This effectively nullifies the provisions in the Code and in 28 U.S.C. § 1334 that such matters can be adjudicated in state courts where the States typically would bring collection actions.[6]

Moreover, many of the issues in such discharge disputes are governed more by state law than by any federal bankruptcy provisions, thus providing even less justification for removing these matters from their natural fora, the state courts. The dischargeability of taxes, for instance, depends largely on the filing date of the taxes and the timeliness of the debtor's returns—both of which are matters that state tax law governs. To the extent there are particular questions and disputes over those issues, the state courts are, with all due respect to the bankruptcy courts, the *better* qualified forum for adjudicating such issues. Similarly, the dischargeability of a domestic support obligation turns upon the nature of the award a *state* court made in the first place and the intricacies of federal domestic support collection law, the latter topic being one with

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[6] There is nothing unusual about adjudicating discharge issues in state court. Indeed, until 1978, there were no requirements that *any* discharge exceptions be adjudicated in the bankruptcy courts. *See Brown v. Felsen*, 442 U.S. 127 (1979).

which state domestic support enforcement agencies in fact have great familiarity, unlike the bankruptcy courts.

In sum, the Amici States will be seriously and detrimentally affected if the lower courts give debtors complete freedom to force litigation of virtually any discharge issue into bankruptcy court, often in distant jurisdictions, and even in no-asset cases where the State has not filed a claim and has not reason to make an appearance.

II. THE FOURTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS

Virginia's Petition for a Writ of Certiorari addresses many of the ways in which the *Collins* decision conflicts with this Court's decisions. The Amici States agree with Virginia's arguments, and will address two of the most far-reaching flaws in the Fourth Circuit's reasoning: (1) that court's elevation of form over substance and (2) its incorrect reliance on the purported *in rem* nature of bankruptcy proceedings.[7]

A. *In re Collins* Improperly Relies On Magic Words And Captions To Dictate The Effect Of A Pleading.

When a State is called upon to protect its interests, and is informed that if it fails to do so the relief requested will be granted, a suit has been instituted against the State, regardless of whether the filing is called a petition, complaint or motion. To hold otherwise—as the Fourth Circuit did—elevates form over substance. Moreover, contrary to *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 119 S. Ct. 2240 (1999), the Fourth Circuit's reliance on the word "suit" ignores the fact that the Eleventh Amendment does not create rights, but rather simply confirms the rights that States had at the Founding. This Court repeatedly has emphasized the

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[7] The Amici States also agree with Virginia's arguments with respect to the substantive discharge issue but do not address that question in light of their view that the Eleventh Amendment should have precluded the lower courts from reaching that issue at all.

impropriety of relying on isolated words or technicalities of form when dealing with the constitutional immunities of the States. *See, e.g., Alden v. Maine*, 119 S. Ct. at 2254 ("To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*."); *Seminole Tribe*, 517 U.S. at 68.

By allowing the mere form of a pleading to dictate the State's immunity, without regard to the substance of the remedy the debtor seeks, the Fourth Circuit's reasoning permits a debtor to litigate any issue involving a State so long as it files its request in the form of a "motion," rather than a traditional complaint. This elevates form over substance, in violation of this Court's oft-expressed view that the scope of the States' immunity turns on the real values at stake, rather than on the "elementary mechanics of captions or pleading." *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 270 (1997).

The Fourth Circuit acknowledged that the bankruptcy court's ruling on the debtor's "motion" would affect Virginia's legal interests: "We recognize that this put the Commonwealth in a tough spot. It could decline to appear and thereby forego the opportunity to make its argument and challenge any decision. On the other hand, it could voluntarily submit to federal jurisdiction and take part in the proceedings." Pet. App. 14a. That alone should have resolved the matter in the State's favor, for that "tough spot" is precisely what the Constitution prohibits.

The Fourth Circuit nevertheless held that "[f]orcing the Commonwealth to make such a choice 'does not amount to the exercise of federal judicial power to hale a State into federal court against its will and in violation of the Eleventh Amendment.'" *Id.* at 14a (citation omitted). The court reasoned that "[t]he Commonwealth . . . was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court. The Commonwealth was free

to respond to the motion or ignore it." *Id.* at 11a. Accordingly, the court concluded, the Collins' motion was not a "suit" for Eleventh Amendment purposes. *Id.*

With all due respect, that reasoning is unpersuasive. The Commonwealth was not "free to respond to the motion or ignore it." The motion put Virginia in a "tough spot" precisely because the State's legal rights would be altered if the State chose not to appear, just as would be the case if the State did not answer a complaint.[8] Put another way, when a federal court enters an order—at the instance of a private individual—that purports to have a binding effect on a State that has not even appeared, much less consented to that court's jurisdiction, that court has violated the Eleventh Amendment, no matter the nature of the proceeding in which the order was issued.[9]

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[8] Both a bankruptcy motion and a complaint identify the court and describe the parties affected and the relief sought, both must be served on affected parties to be effective, and both provide that the failure to respond in a timely fashion will result in a default judgment. Compare FRCP 4 (the summons shall "require the defendant to appear and defend, and shall notify the defendant that *in case of the defendant's failure to do so judgment by default will be rendered against the defendant*" (emphasis added)) with FRBP 9013 (motions shall state with particularity the grounds therefor, shall set forth the relief or order sought, and be served by the moving party on those entities specified by the rules) and FRBP 9014 (in contested matters in which relief is requested by motion, reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought, and motion shall be served in the manner provided for service of a summons and complaint). *See also In re O'Brien Environmental Energy, Inc.*, No. 98-6331 1999 WL 707781, at *6 (3rd Cir. September 13, 1999) (Bankruptcy Rules "generally require a motion when notice *to an opposing party* is necessary, and only allow an application if no such notice is required" (emphasis added)). *And see Black's Law Dictionary* 1434 (6th ed. 1990) (defining "suit" as a "generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law . . . .").

[9] *Cf. United States v. Murdock Machine and Engineering Co. of Utah*, 81 F.3d 922, 931 (10th Cir. 1996) ("In determining whether the United States

Legal formalities are especially untrustworthy in a court of equity, such as a bankruptcy court. Bankruptcy is meant to be a simple and expedient remedy for good faith debtors seeking a fresh start. It would be contrary to that end, therefore, to require that the caption of the petition be amended and the document served and re-served on each creditor, every time a new creditor or claim is added. Instead, the petition merely lists the name of the debtor at the top and schedules the creditors in a separate list that provides the basis for service of notice of the various proceedings in the case. Proper listing and service of creditors plays a critical role in bankruptcy court because, if a creditor is not listed or served with notice, the discharge or other action is generally ineffective against that creditor. *See, e.g.*, Section 523(a)(3); *In re Unioil*, 948 F.2d 678, 683-684 (10th Cir. 1991); *United States v. Cardinal Mine Supply Co.*, 916 F.2d 1087, 1089-1092 (6th Cir. 1990); and *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 833-835 (11th Cir. 1989).

At bottom, there is no practical distinction between a motion that seeks to affect the rights and interests of the parties in a bankruptcy and a complaint that does the same in a typical civil case. The existence of a "suit" is a question of function and effect, not artful captioning. Thus, whether labeled a "suit" or a "motion," when a debtor's action seeks to alter a State's legal rights, a proceeding within the meaning of the Eleventh Amendment has been instituted against the State.

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is immune from 'suit,' courts interpret the term 'suit' broadly to include more than just an actual suit instituted against the United States. . . . Thus, the term 'suit' embodies the broad principle that the government is not subject to 'legal proceedings, at law or in equity' or 'judicial process' without its consent. . . . Interpreting the term 'suit' broadly comports with the core notion of sovereign immunity that in the absence of governmental consent, the courts *lack jurisdiction* to 'restrain the government from acting, or to compel it to act.' *Larson*, 337 U.S. at 704, 69 S.Ct. at 1468.")

B. The Fourth Circuit's Decision Rests On An Improper Understanding Of Federal Courts' *In Rem* Jurisdiction

The Fourth Circuit made two fundamental errors concerning the interaction of bankruptcy law, *in rem* proceedings and the Eleventh Amendment. First, the court erred in holding that bankruptcy proceedings are simply *in rem* actions. Second, the court erred in holding that the Eleventh Amendment does not apply to in rem actions. Both of these errors will create significant problems for the States if the Fourth Circuit's holdings are not reversed.

1. The Fourth Circuit held that the bankruptcy court's jurisdiction stems from the court's jurisdiction over the debtor's assets and person. Pet. App. 11a. But a bankruptcy discharge injunction necessarily requires more than jurisdiction over the debtor and his estate. A discharge order enjoins the world at large from seeking to enforce claims against the debtor's assets, except in compliance with the bankruptcy court's order. The discharge of debts—which bars future actions by creditors—is the unique essence of a bankruptcy case. Whether or not a creditor files a claim, whether or not that claim is satisfied, indeed, whether or not there is *any* property in the estate at all, the debtor may still receive a discharge that enjoins all further litigation over debts previously incurred. *See In re Newport Offshore Ltd.* 219 B.R. 341 (Bankr. D.R.I. 1998). This right to impose a discharge obligation that precludes future litigation by creditors must stem from some power other than *in rem* jurisdiction over the debtor's assets.

Although a bankruptcy proceeding serves to divide the assets of the debtor's estate, it does much more than that. A true *in rem* action, such as an interpleader proceeding, does nothing more than to divide up an existing asset. Even in a *quasi in rem* action, where a court exercises jurisdiction over an asset in order to compel a defendant to appear in a locale that could not otherwise exercise power over him, the court's

jurisdiction extends no further than to the parties' rights in the asset at issue. By definition, an action that is based merely on control over a *res* can only determine rights to that particular *res* between various claimants. It does not serve to foreclose future litigation between those persons if the asset at issue was insufficient to satisfy all pending claims. By contrast, bankruptcy courts do exactly that—imposing an injunction on all attempts to collect existing debts from future assets—which is why their orders cannot be based solely on *in rem* jurisdiction.

2. In any event, this Court repeatedly has held that the Eleventh Amendment applies to *in rem* proceedings. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) ("we have never applied an in rem exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists, see *United States v. Shaw*, 309 U.S. 495, 502-503 (1940)"); *Cory v. White*, 457 U.S. 85 (1982) (Eleventh Amendment bars federal court from determining a State's rights in Howard Hughes' estate—the classic *res—in a federal interpleader action filed by the estate's administrator); Missouri v. Fiske*, 290 U.S. 18 (1933) (proceeding to restrain State from adjudicating interests in the decedent's estate was a "suit" within the meaning of Eleventh Amendment even though it sought only injunctive relief).

The Court has applied similar reasoning to *in rem* suits involving the United States. In *United States v. Shaw*, for example, the United States filed a claim in a state probate court and the state court determined that the estate possessed a counterclaim against the United States that exceeded in amount the claim of the United States. The argument was made that the court's order was not really a judgment, but "only a judicial ascertainment" of "credits with respect to the *res* of the debtor's estate." This Court nonetheless held that the United States' immunity from judgments in state courts protected it from having an affirmative judgment entered against it *even though* it had voluntarily appeared and filed a claim in the case.

At most, the lower court could find that the countervailing claim was sufficient to defeat the government's claim. 309 U.S. 504. The fact that the state court's action was based on its *in rem* jurisdiction over the decedent's estate was not deemed sufficient to allow the court to enter orders unrelated to the *res* against the United States.[10]

The Fourth Circuit's opinion ignores these precedents and could be applied in many other areas of the law outside of bankruptcy. Indeed, the Fourth Circuit's approach could virtually nullify the Eleventh Amendment in any case in which a federal court has jurisdiction over property. If a federal court's control over an asset is sufficient to trump the States' Eleventh Amendment immunity, the States can expect to see numerous situations characterized as *in rem* exceptions to the States' immunity by ingenious plaintiffs and sympathetic courts.

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[10] Similarly, in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), the lower court entered judgment on a counterclaim against the United States in a reorganization proceeding, based on the court's jurisdiction over the *res* of the company at issue. This Court held that the decision was void, and could be collaterally attacked in a subsequent proceeding, because the federal government had not consented to entry of the order.

Conclusion

The Amici States request that Virginia's Petition for a Writ of Certiorari be granted.

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In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, ET AL., PETITIONERS

v.

HERBERT MARTELL COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Amendment precludes a bankruptcy court from issuing a decision that a debt owed to a State is dischargeable.

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In the Supreme Court of the United States

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v.

HERBERT MARTELL COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 173 F.3d 924. The opinion and order of the district court (Pet. App. 22-34) is unreported. The memorandum opinion and order of the bankruptcy court (Pet. App. 35-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1999. A petition for rehearing was denied on June 2, 1999. Pet. App. 48-49. The petition for a writ of certiorari was filed on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Herbert Collins, a former bail bondsman, owed the Commonwealth of Virginia (petitioner) more than $37,000 in unpaid bonds of criminal defendants who had failed to appear in court. In 1990, Collins and his wife (respondents) filed for bankruptcy. Respondents identified the debt to petitioner as an unsecured claim. As is typical in a "no-asset" liquidation case such as this one, petitioner did not file a proof of claim in the bankruptcy case and did not object to discharge. The bankruptcy court issued an order releasing respondents "from all dischargeable debts." Pet. App. 3-4.

Some time after respondents received their discharge in the bankruptcy court, petitioner instituted garnishment proceedings to recover the debt it was owed as a result of the default on the bonds. Respondents then moved the bankruptcy court to reopen their bankruptcy case to consider the dischargeability of the debt owed to petitioner. Pet. App. 4. The motion to reopen the bankruptcy case indicated that, after reopening, respondents planned to bring an adversary proceeding against petitioner to determine the dischargeability of the debt. C.A. App. 42.

A copy of respondents' motion to reopen was served by mail on petitioner, but petitioner was not named as a defendant and was not served with compulsory process. Pet. App. 11. Petitioner filed an objection to the motion to reopen, claiming that the debt was for a "fine, penalty or forfeiture" within the meaning of 11 U.S.C. 523(a)(7) and therefore not dischargeable. After a hearing in which petitioner participated, the bankruptcy court rejected petitioner's argument that the debt was not dischargeable and reopened the bankruptcy case. Pet. App. 35-47. Petitioner appealed the decision to

reopen to the district court, once again arguing that the debt was not dischargeable. The district court agreed with the bankruptcy court that the debt was dischargeable, *id.* at 23-35, and, in light of that holding, it rejected petitioner's contention that the bankruptcy court abused its discretion in reopening the case, *id.* at 33. The district court therefore affirmed the bankruptcy court's order. *Id.* at 4, 23.

2. Petitioner appealed to the court of appeals and argued for the first time that the Eleventh Amendment precluded the relief ordered by the bankruptcy court. In light of petitioner's constitutional challenge to the Bankruptcy Code, the United States intervened in the court of appeals. Pet. App. 4-5.

The court of appeals affirmed. Pet. App. 1-20. The court held that respondents' motion to reopen the case under the Bankruptcy Code was not a suit against a State within the meaning of the Eleventh Amendment. The court explained that "[a]n adversary proceeding, with its compulsory process, is not required to reopen a case"; that petitioner "was not served with process, and was not compelled to appear in bankruptcy court"; and that petitioner "was free to respond to the motion or ignore it." *Id.* at 10-11.

The court of appeals rejected petitioner's contention that the bankruptcy court's determination that the debt was dischargeable transformed the motion to reopen into a suit against a State barred by the Eleventh Amendment. The court noted that petitioner "chose to appear in bankruptcy court and oppose [respondents'] motion to reopen on the ground that the bail bond debt was nondischargeable," and it emphasized that "[a] federal court's jurisdiction over the dischargeability of debt * * * derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over

debtors and their estates." Pet. App. 11 (internal quotation marks omitted). The court therefore concluded that "[t]he Eleventh Amendment was not implicated." *Id.* at 15.

Proceeding to the merits, the court held that a debt for bail bonds is not a "fine," "penalty," or "forfeiture" within the meaning of the Bankruptcy Code. The court therefore concluded that such a debt is dischargeable in bankruptcy. Pet. App. 15-19.

ARGUMENT

Petitioner contends (Pet. 8-24) that the Eleventh Amendment precludes a bankruptcy court from issuing a decision that a debt owed to a State is dischargeable. In the circumstances of this case, that contention is without merit and does not warrant review.*

1. The Eleventh Amendment generally precludes a private party from suing a State in federal court absent its consent. *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As the court of appeals in this case held, however, respondents' motion to reopen their bankruptcy case did not constitute "a suit * * * 'against one of the United States'" within the meaning of the Eleventh Amendment. As the court of appeals explained (Pet. App. 11), although petitioner was served with a copy of respondents' motion, petitioner was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court. Petitioner was "free to respond to the motion or ignore it." *Ibid.* In those circumstances, respondents' motion to reopen

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* Petitioner also contends (Pet. 24-30) that a bail bond debt is not dischargeable. Because the United States intervened in the court of appeals solely to address petitioner's Eleventh Amendment argument, we take no position on the question whether a bail bond debt is dischargeable.

had none of the characteristics of a suit against a State, and the Eleventh Amendment therefore was not implicated. See *Seminole Tribe*, 517 U.S. at 58 (Eleventh Amendment exists in order to prevent federal-court judgments that must be paid out of a State's treasury and to avoid subjecting a State to the coercive process of judicial tribunals at the instance of private parties).

Petitioner does not contend that respondents' motion to reopen was itself a suit against a State within the meaning of the Eleventh Amendment. Instead, petitioner argues that the motion was transformed into a suit against a State when the bankruptcy court issued a decision that the debt respondents owed to petitioner was dischargeable under the Bankruptcy Code. That contention ignores the unusual circumstances that led the bankruptcy court to make a decision on the dischargeability of the debt in this case.

Respondents' motion to reopen did not request an immediate determination on the dischargeability of the debt. Instead, respondents' motion contemplated that, once the case was reopened, they would file an adversary action to obtain such a determination. See C.A. App. 42. Accordingly, when respondents filed their motion to reopen, petitioner could have ignored the motion, awaited the filing of an adversary action, and asserted sovereign immunity as a defense to such an action. Alternatively, petitioner could have sought to enter a special appearance to oppose the motion to reopen on the ground that reopening would be futile because an adversary action would be barred by sovereign immunity. Petitioner, however, pursued neither of those alternatives. Instead, petitioner "chose to appear in bankruptcy court and oppose [respondents'] motion to reopen on the ground that the bail bond debt was nondischargeable." Pet. App. 11. Having invited the

bankruptcy court to make a decision on the dischargeability of the debt in the context of respondents' motion to reopen, petitioner is in no position now to complain that the Eleventh Amendment precluded the bankruptcy court from accepting that invitation.

This Court's decision in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), is instructive. There, New Jersey filed a proof of claim in bankruptcy court, but when the trustee filed a petition objecting to the claim, New Jersey argued that entertainment of the petition by the bankruptcy court would constitute a prohibited suit against a State. The Court squarely rejected that contention. The Court held that "[i]t is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure," and that "[i]f the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim." *Id.* at 573-574.

In *In re Platter*, 140 F.3d 676 (1998), the Seventh Circuit applied that same principle in the context of a bankruptcy court's dischargeability determination. There, a state agency filed an adversary action against a debtor in bankruptcy court, contending that a debt owed to the state agency was not dischargeable. After the bankruptcy court held the debt dischargeable, the state agency argued that the Eleventh Amendment precluded the bankruptcy court from making that determination. The Seventh Circuit rejected that argument, explaining that "[t]he Eleventh Amendment does not prevent a state from entering a federal forum voluntarily to pursue its own interest. However, if a state embarks down this route, it cannot run back to

seek Eleventh Amendment protection when it does not like the result." 140 F.3d at 680 (citation omitted).

The decision below is consistent with the decisions in *Gardner* and *In re Platter*. Petitioner had no obligation to respond to respondents' motion to reopen the case. Having chosen to file an objection to the motion to reopen on the express ground that the debt was not dischargeable, petitioner cannot escape the consequences of its actions by taking refuge in the Eleventh Amendment. The court below correctly rejected petitioner's effort to transform the Eleventh Amendment from a shield against unconsented suit into a means of escaping the effect of an invited decision on the merits.

2. Review is unwarranted in this case for the additional reason that the issue presented is quite narrow and is unlikely to recur in the future. The decision in this case is a product of petitioner's decision to challenge a motion to reopen on the ground that the debt was not dischargeable. In future cases, States that desire to avoid a bankruptcy court determination on dischargeability are unlikely to expressly invite one. Instead, States that want to avoid such a determination will either ignore the motion to reopen and await an adversary proceeding, at which time they can raise a defense of sovereign immunity, or oppose the motion to reopen on the ground that reopening would be futile because they will assert sovereign immunity in response to any adversary proceeding.

The issues that are likely to arise in that context are quite different from the question presented here. Those issues include (1) whether a bankruptcy court would have authority under the Bankruptcy Code to make a decision on dischargeability in the context of a motion to reopen, rather than in an adversary proceeding, when the State has not invited such a

determination; (2) whether a debtor could obtain a determination that a debt owed to a State is dischargeable by filing an action under *Ex parte Young*, 209 U.S. 123 (1908), against the state official who is attempting to collect the debt; and (3) whether a debtor could obtain a dischargeability determination by filing an adversary action against the State under 11 U.S.C. 106(a). The third question would implicate the constitutionality of Section 106(a), which expressly authorizes a debtor to file an adversary action against a State in bankruptcy court. Because petitioner invited the bankruptcy court to make a determination on dischargeability prior to the initiation of an adversary proceeding, however, none of those questions is presented here.

3. Finally, petitioner does not even allege that there is a conflict in the circuits on the question presented in this case. The absence of such a conflict further counsels against review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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HERBERT MARTELL COLLINS AND
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**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

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REPLY BRIEF OF THE PETITIONER

The Brief in Opposition of the United States is remarkable for what it does not say and for the issues the Federal Government chooses not to address. This Reply Brief is filed pursuant to Rule 15 of the Rules of this Court to respond to the new points raised in the Brief in Opposition.

FACTS OMMITTED FROM THE BRIEF IN OPPOSITION

1. In response to the Collins' Amended Motion to Reopen their Chapter 7 bankruptcy case, the Commonwealth of Virginia ("the State") made "a special appearance . . . for the sole purpose of objecting to the [Collins'] Amended Motion to Reopen." *See* Appendix (App.) to Pet. at 54, 56.

2. The Collins' discharge order only discharged "all debts dischargeable under 11 U.S.C. 523." *See* App. to Pet. at 65. Debts owed to the State as a result of a forfeiture are expressly not dischargeable. *See* 11 U.S.C. § 523(a)(7). Bankruptcy Rule 7001(6) requires that a determination of dischargeability be made through an adversary proceeding.

3. Upon a Motion to Reopen to determine dischargeability filed in a bankruptcy court in the Fourth Circuit, a debtor is required to make a preliminary showing that the debt is likely to be dischargeable. In effect, the issue of dischargeability is previewed although the substance or the merits are not fully litigated at the Motion to Reopen stage. *See e.g., In re Thompson*, 16 F.3d

576, 582 (4th Cir. 1994) ("Since the debt is non-dischargeable, there was no reason for the Bankruptcy Court to reopen the proceedings to determine whether or not the debt should be discharged"). The merits of the Collins' dischargeability claim have not been litigated.

REPLY TO FEDERAL GOVERNMENT'S ARGUMENT

The Federal Government first argues that the Commonwealth has either waived or is estopped from asserting its Eleventh Amendment immunity – an argument specifically rejected by the lower court. Second, after framing the question presented in very broad terms (see p. (I) of Brief in Opp.), the Federal Government asserts "the issue presented is quite narrow and is unlikely to recur in the future." Brief in Opp. at 7. This argument not only ignores recent case developments, it also dismisses out of hand, the concerns expressed in the Brief of the Amici States filed by the Kansas Attorney General and joined by thirty-three (33) other states. Finally, the Federal Government asserts that the Petition does not *allege* "a conflict in the circuits on the question presented in this case"; nonetheless such a conflict exists.

1. This Court has consistently held that "in deciding whether a State has waived its constitutional protection under the Eleventh Amendment we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). A waiver of Eleventh Amendment immunity may be effected by state

statute or constitutional provision, or other express waiver. As this Court has emphasized, a waiver or estoppel requires "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. . . . 'Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . . ' " *Id.* Any suggestion by the Federal Government that the State waived or is estopped from raising its Eleventh Amendment immunity because it failed to raise it upon a limited appearance at the Motion to Reopen stage is unsupportable.

The Federal Government's argument confuses the dischargeability preview that is part of a procedural question of whether to reopen the bankruptcy case, with the separate, substantive determination of dischargeability, to be litigated in an adversarial proceeding. The State appreciated the differences between the two and attempted to address them separately. The United States asserts that "petitioner argues that the motion was transformed into a suit against a State when the Bankruptcy Court issued a decision that the debt . . . was dischargeable. . . . " Brief in Opp. at 5. That is not exactly what the State argued. The Bankruptcy Court improperly ruled on the merits of the Collins' dischargeability claim when the only issue before the Bankruptcy Court was whether the Collins' bankruptcy case should be reopened. As a result, the State was never served with an adversarial claim, never had an opportunity to assert its Eleventh Amendment immunity in the Bankruptcy Court, and was deprived of any opportunity to litigate the merits of the dischargeability issue.

The cases the Federal Government relies upon do not apply to Petitioner. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), the state (New Jersey) filed a proof of claim against the debtor, thereby voluntarily submitting to the jurisdiction of the Bankruptcy Court. Virginia did not file a proof of claim or otherwise submit to the jurisdiction of the Bankruptcy Court for any purpose other than to object to the Motion to Reopen. Similarly, in *In re Platter*, 140 F.3d 676 (7th Cir. 1998), the state initiated an adversary proceeding against the debtor, thereby expressly invoking the jurisdiction of the Bankruptcy Court.

2. The United States asserts that review of this case is unwarranted because the issue presented is "quite narrow and is unlikely to recur in the future." Virginia and thirty-four (34) other States respectfully disagree. In fact, another Petition for Writ of Certiorari currently pending before this Court raises the identical issue – what proceedings in a bankruptcy court constitute a "suit" for Eleventh Amendment purposes. *See NVR Homes, Inc. v. Maryland*, 189 F.3d 442 (4th Cir.), *petition for cert. filed November 8, 1999* (No. 99-792).

The Federal Government admits that the following issues are likely to recur:

1) Whether a Bankruptcy Court would have authority under the Bankruptcy Code to make a decision on dischargeability in the context of a motion to reopen, rather than in an adversary proceeding, when the State has not invited such a determination;

2) Whether a debtor could obtain a determination that a debt owed to a State is dischargeable by filing an action under *Ex parte Young*, 209 U.S. 123 (1908); and

3) Whether a debtor could obtain a dischargeability determination by filing an adversary action against the State under 11 U.S.C. § 106(a).

See Brief in Opp. at 7-8. Virginia's Petition raises these issues for the following reasons:

1) Until this Court speaks to the isssues raised in the Petition, there will always be a question of what conduct (and when the absence of conduct) by a State constitutes an "invitation" to the Bankruptcy Court to decide the merits of the State's claim.

2) *Ex parte Young* clearly should not apply. *See Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996) ("the relief sought by a plaintiff suing a state is irrelevant to the question of whether the suit is barred by the Eleventh Amendment."); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) (a suit nominally against State officials that is, in fact, a suit against a State is barred regardless of whether it seeks damages or injunctive relief); *Corey v. White*, 457 U.S. 85, 91 (1982) (same). Although this issue is not directly raised in the Petition, it would nonetheless be subsumed in any decision by this Court addressing the first issue.

3) Whether a debtor could obtain a dischargeability determination by filing an adversary action against the State is an issue that is clearly part of the "what constitutes a suit in bankruptcy" question raised by the Petition.

Not only are the issues raised in the Petition recurring, bankruptcy courts are reading the lower court decision to create a new exception to the Eleventh Amendment. In *Phelps v. Sallie Mae Loan Service Center (In re Phelps)*, 237 B.R. 527, 534 (Bankr. D.R.I. 1999), the court relied on the lower court decision to find no "suit" for Eleventh Amendment purposes where the governmental entity "is not summoned to appear before this Court [and] was not served with process." In *Robertson v. University of Virginia (In re Robertson)*, 237 B.R. 124 (Bankr. W.D. Va.), the Bankruptcy Court relied on the lower court decision to hold that *all* dischargeability claims are excepted from the Eleventh Amendment. In *Robertson* the debtor filed an adversary proceeding under Bankruptcy Rule 7001(6) to have the discharge of his indebtedness determined pursuant to 11 U.S.C. § 523(a)(8). Notwithstanding the State's assertion of immunity, the Bankruptcy Court reasoned:

> However, the decision in *Collins* carves out an exception to the applicability of *Schlossberg* where discharge is involved. When discharge is at issue, the jurisdictional power of the bankruptcy court derives from control over the debtor and federal supremacy with respect to bankruptcy trumps any Eleventh Amendment claim of immunity by the State. 237 B.R. at 127.

3. The Circuit Courts are divided over what constitutes a "suit" in the bankruptcy context for purposes of the Eleventh Amendment. For example, in *NVR Homes, Inc., supra*, the Fourth Circuit relied upon the lower court's decision to find a debtor's claim barred by the Eleventh Amendment even though the State had not been

served with process and had not participated. This conflicts with *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 865 (1999), where the Fifth Circuit determined that the Eleventh Amendment does not "prevent[ ] the discharge of a debt owed to a State in a bankruptcy proceeding in which the State does not participate . . . ." *Id.* at 820.

District and bankruptcy courts are also divided on the recurring suit question in bankruptcy proceedings. *Compare A.H. Robins Co. v. Dieleuterio (In re A.H. Robins)*, 235 B.R. 406 (Bankr. E.D. Va. 1999) (applying Eleventh Amendment to adversarial action against state officials) *with In re Barrett Refining Corp.*, 221 B.R. 795, 804 (Bankr. W.D. Okla. 1998) (holding a bankruptcy case is not a suit against a State "because a bankruptcy petition does not seek damages against another party . . . there is no opposing party whose property is subject to attachment . . . [and] compulsory process is not issued against an opposing party by the filing of a bankruptcy proceeding.") and *Smith v. Psychiatric Hospitals of Fla., Inc.*, 216 B.R. 660 (M.D. Fla. 1998) (debtor's motion held not to be a suit). This Court has granted certiorari "[t]o address a conflict among Bankruptcy Courts." *See Pennsylvania Dep't of Pub. Welfare v. Davensport*, 495 U.S. 552, 557 (1990). Moreover, the Fourth Circuit's decision that 11 U.S.C. 523(a)(7) does not apply to bail bond forfeitures conflicts with the plain meaning of the statute. *See Reading Co. v. Brown*, 391 U.S. 471, 475 (1968).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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